

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA)
Plaintiff,)
v.) Criminal No. 21-00036-ELH
JACKY LYNN MCCOMBER)
Defendant.)

Baltimore, Maryland
December 21, 2023
10:05 a.m.

THE ABOVE-ENTITLED MATTER CAME ON FOR
MOTIONS HEARING
BEFORE THE HONORABLE ELLEN L. HOLLANDER

APPEARANCES

On Behalf of the Plaintiff:
JEFFERSON M. GRAY, ESQUIRE

On Behalf of the Defendant:
PATRICIA RICHMAN, ESQUIRE
CRYSTAL WEEKS, ESQUIRE
ALLI KATZEN, ESQUIRE (via telephone)

Also Present:
JAMES PINE, DOD-IGS

(Computer-aided transcription of stenotype notes)

Reported by:
Ronda J. Thomas, RMR, CRR
Federal Official Reporter
101 W. Lombard Street, 4th Floor
Baltimore, Maryland 21201

1 (10:05 a.m.)

2 **THE COURT:** Good morning, everyone. Please call the
3 case.

4 **MR. GRAY:** Good morning, Your Honor. We're here this
5 morning in the matter of United States v. Jacky Lynn McComber.
6 This is Criminal Case ELH-21-036. The matter has been set in
7 this morning for a hearing in response to a letter filed by the
8 defense on December the 9th. I'm Jefferson Gray, Assistant
9 United States Attorney here on behalf of the United States.

10 **THE COURT:** All right. Counsel.

11 **MS. RICHMAN:** Good morning, Your Honor. Patricia
12 Richman from the Federal Public Defender's office. I'm here
13 today on behalf of Ms. McComber. Joining me at counsel table
14 is Crystal Weeks, who is from the law firm Weil Gotshal and is
15 cocounseling this case with us.

16 **THE COURT:** Don't we also have one of the defense
17 attorneys on the phone?

18 **MS. WEEKS:** Correct.

19 **MS. RICHMAN:** My apologies, Your Honor, yes. I
20 believe Alli Katzen is calling on the phone. She lives in
21 Miami.

22 **THE COURT:** Okay. And of course Ms. McComber is here
23 as well. Everyone can have a seat. I scheduled this hearing
24 in response to the defense request of December 9. I believe
25 that was a Saturday. ECF-387 is the docket entry for the

1 letter. And you asked that the Court set a discovery
2 conference next week to address the discovery issues raised in
3 the Government's letter, which you then proceeded to address in
4 your letter.

5 And I just want this record to reflect that we held an
6 unexpected conference call yesterday, began around 5:30 p.m.,
7 concluded approximately 6:00 p.m. I want to thank court staff
8 as well as counsel for making themselves available. And I
9 thought it was necessary to have that conference call because
10 the Government, as we discussed yesterday, submitted its
11 response at about close to 5:00 o'clock, it was around
12 4:40 p.m., and there were a lot of exhibits and the Court was
13 concerned because I was not going to be able to spend the
14 evening working on this.

15 So we did discuss next steps, if you will. I learned in
16 that conference call that the defense is no longer pressing its
17 issue regarding Ms. McComber's security file at NSA. So that
18 issue, apparently, has been resolved between the parties. And
19 I do want to incorporate whatever it is that was discussed
20 yesterday so that if there's any need to review what transpired
21 today, whoever reviews what transpired today will be aware
22 there were discussions that took place last night.

23 With that, if counsel wish to say anything preliminarily,
24 I'm more than happy to hear from you.

25 Ms. Richman, would you like to go first before you asked

1 for the conference?

2 **MS. RICHMAN:** Yes, Your Honor, thank you. Before I
3 begin, one personal matter, Your Honor, my daughter has the
4 stomach flu. My husband is home with her this morning. He has
5 a work related obligation at 1:00 p.m.

6 **THE COURT:** I sure hope we're done well before that.

7 **MS. RICHMAN:** Okay. Thank you, Your Honor. I was
8 going to step out.

9 **THE COURT:** The real question is should we go get our
10 masks?

11 **MS. RICHMAN:** I actually -- this is too much detail
12 about my life, Your Honor, but last night I just stayed in town
13 in order to be prepared for the hearing and because the federal
14 defenders had their holiday party.

15 **THE COURT:** Okay.

16 **MS. RICHMAN:** I told my husband the more prudent path
17 would probably be for me to continue to stay away, but he does
18 not seem to agree with my assessment.

19 I'll go to the podium, Your Honor, if that's --

20 **THE COURT:** Before you start any argument, though, my
21 original question was did you want to say anything
22 preliminarily? And then we'll hear the substance.

23 **MS. RICHMAN:** No, Your Honor.

24 **THE COURT:** I'm inviting both sides for that, of
25 course.

1 **MS. RICHMAN:** Oh, of course. I think, Your Honor,
2 preliminarily I'd like to say that we are eager to get to the
3 final disposition of this case, and we want to find a
4 resolution today that can serve that goal. And, you know, I
5 understand that this case has been extremely burdensome, both
6 on the Court and upon Mr. Gray. I want to emphasize that our
7 reason for making this request is based on our assessment of
8 our professional obligations in light of the outstanding
9 factual matters in this case that in some part rely on extra
10 trial record material and, you know, we are anxious to just
11 bring it to a close.

12 So I think that one way to do that is just to have a clear
13 statement on the record of the Government's position with
14 respect to the loss-related discovery that we are seeking. We
15 have made inquiries about that because this case has the
16 unusual posture of having prior trial counsel deciding to go to
17 trial when the Government was in the midst of a document
18 collection in response to this Court's November order directing
19 it to search for and collect certain materials.

20 **THE COURT:** And, you know, I don't want to rewrite
21 history, and I don't want to revisit history, and my memory
22 could be faulty, so with all of that being said, I always
23 thought that my ruling in giving Mr. Ahlers what he wanted was
24 probably way too generous. So I'll take the blame for giving
25 him material I was never sure he should get.

1 And I think that's important because to the extent he
2 chose, and this was the defense decision because the Court
3 would have -- the Government did not want to go, is my memory,
4 and Mr. Gray may disagree. But we went forward because that's
5 what the defense wanted to do. The requests were incredibly
6 burdensome. I never really fully grasped what he wanted and
7 why he wanted it and what relevance he thought any of it had.
8 My understanding was he was trying to show she really, to use
9 the terms we sometimes used in this case, really did do the
10 work.

11 And what he wanted was a massive undertaking from an
12 agency that doesn't like to release anything. It was bound to
13 be as problematic as it turned out to be.

14 But the fact that I granted that request is probably the
15 root of the problem and probably I shouldn't have but I did. I
16 did because for a variety of reason that don't matter. And
17 here we are.

18 So that is really important to me because the argument is
19 going to be made I'm sure at some point that that was a huge
20 strategic mistake and he never should have gone to trial
21 without having every single thing he asked for. But I can't
22 revisit that, it was his choice. But whether he really ever
23 needed it in the first place is the real question and why he
24 needed it. He kept calling it *Brady* material, which I never
25 understood either.

1 So I appreciate your letting me just make that point. I
2 hope it's clear.

3 **MS. RICHMAN:** Of course, Your Honor. And thank you
4 for that. It's been a challenge to get up to speed on the many
5 aspects of this case, the many chapters that have unfolded.

6 I think that with respect to that order, that is why we've
7 always told the Government we will take them at their word if
8 they tell us that -- we believe this is not all the material
9 that is identified in that order, but we do think there's a
10 subset of that material that could affect the sentence in this
11 case. And as we know, of course *Brady's* obligations continue
12 after the verdict. They continue through sentencing.

13 Here, the guidelines calculation in this case is driven by
14 a 12-point assessment that is based on the Government's
15 asserted theory of loss which is that she actually worked
16 15 percent of the time and that's the amount of loss that
17 should drive her sentence.

18 This is a different question than the issue of whether the
19 invoices were materially false, which is what the jury
20 considered and returned its verdict on. And we do have
21 statements from the Government during the trial that
22 calculating the exact number of hours that she worked is a
23 fairly impossible task.

24 So when we look at the world of documents that we are
25 interested in the Government giving us a clear statement of

1 whether they're in its possession or not, and we will accept
2 it, Your Honor, they are documents that would be
3 contemporaneous documentation of her performance as project
4 manager, documentation of her fulfilling her responsibilities.
5 And we think some of that documentation could reflect
6 off-campus work as well. If it's not there, it's not there,
7 Your Honor.

8 We just, in the exercise of due diligence, and consistent
9 with our ethical and constitutional obligations to our client,
10 thought it was very important early in this case to make the
11 request to the Government. I have the correspondence here to
12 enter into the record here today. And at first the Government
13 indicated that it agreed that it should go take a look for
14 those materials. Later it said it didn't know of --

15 **THE COURT:** And I apologize for interrupting you, I
16 don't want you to get into your arguments.

17 **MS. RICHMAN:** Okay.

18 **THE COURT:** I just was asking did you need to
19 supplement anything I said so that there's -- to add clarity to
20 why we're here and what we're doing. Was there any
21 preliminarily that you wish to add?

22 **MS. RICHMAN:** No, Your Honor. I think I just wanted
23 to officially state this is our ask, and this is how we think
24 it can be resolved, and we can move on today.

25 **THE COURT:** I'll be happy to hear how we can resolve

1 it. I'll call you on, Mr. Gray, just preliminarily did you
2 wish to make any points to correct or add or supplement to what
3 I may have said?

4 **MR. GRAY:** No, Your Honor. I'll hold my response to
5 what Ms. Richman said until later. When I say no, the only
6 other thing I will add is there had been a lot made about
7 supposed discovery issues with regard to examiner Eisenhardt's
8 testimony in the sentencing hearing and that obviously I think
9 is now completely off the table. We've had that hearing. The
10 defense has not raised any complaints about having adequate
11 material to use in preparation for that and for her
12 cross-examination so I think that's done.

13 **THE COURT:** Well, when you do speak, Mr. Gray, the one
14 matter I guess I'll be interested in, in addition to where we
15 are today, and maybe this is water under the bridge, but not
16 really in some ways, the undercurrent of the allegation that
17 the defense went to trial without completing discovery and --
18 that's going to take on a life after this sentencing, and
19 that -- I think it is accurate that the Government wasn't --
20 hadn't completed its production. There had been dates where it
21 was anticipated. Mr. Cooch wrote letters. They're in the
22 record. The Government thought it would be X date. Then X
23 date came, it couldn't finish. And it wasn't -- when I say the
24 Government, NSA is part of the Government, but I don't mean the
25 prosecutors because I had the impression at the time this was

1 not something they could control. NSA has its own very
2 stringent procedures that it was adhering to as to the process
3 of releasing information and what had to be redacted, et
4 cetera.

5 That said, Mr. Gray, my impression was that the defense
6 made the decision to go forward because it knew well that it
7 had plenty. I don't know what else could have been out there
8 that it didn't have. Obviously I never was the one doing the
9 search. But I think that's an important point for you to speak
10 to, if you can.

11 **MR. GRAY:** Yes, Your Honor. I was anticipating that
12 might come up today and so when it's my time to speak fully
13 I'll do so.

14 **THE COURT:** Okay. Because I'll be interested in that
15 as well. Okay. So now it is your turn, Ms. Richman.

16 **MS. RICHMAN:** Thank you, Your Honor.

17 **THE COURT:** And what I'll appreciate is what you need,
18 why you need it, and from there we can go forward.

19 **MS. RICHMAN:** Thank you, Your Honor. If I can have a
20 moment to get all my papers situated.

21 **THE COURT:** And I guess the third point would be why
22 you're entitled to it.

23 **MS. RICHMAN:** Thank you, Your Honor.

24 So I think that having framed the issues, thank you for
25 the opportunity, Your Honor, to do so, I do want to look a bit

1 more at the materials that we wanted the Government to check
2 for and have been requesting. I have copies of some of this
3 correspondence for the Court that we can pass up as we show and
4 we will enter into the record and for the Government as well
5 but sort of starting out here.

6 **THE COURT:** Thank you.

7 **MS. RICHMAN:** So, Your Honor, in passing up some
8 correspondence that we sent to the Government August 2nd, 2023.
9 Backing up a little bit to the procedural history of this case.
10 Ms. McComber's prior counsel withdrew from the case, I believe
11 in May, and our office was appointed to represent her. I
12 entered my experience either very late May or early June, and
13 immediately my first task was to organize and assess the
14 voluminous record in this case. And part of that was,
15 unfortunately, we did not have a complete volume of the
16 discovery available from prior counsel's file. We asked
17 Mr. Gray to provide it. And we also undertook the task of
18 reviewing the very lengthy transcript in this matter and
19 attending to issues around the Rule 29 motion.

20 During that review it became apparent that there are
21 issues, as I mentioned, related to loss. The number of hours
22 that Ms. McComber worked. There is evidence that has been
23 produced in discovery that was not part of the trial that is
24 relevant to that and that we will ask the Court to consider.

25 We looked at the past history of discovery and requests,

1 and in our assessment in looking at the Court's order, just the
2 plain language of it -- and, of course, Your Honor, I hope you
3 will bear with us because one of the difficulties has always
4 been to understand the full context of words on paper in this
5 case because there has been so much -- we did identify some
6 materials still extant that appeared to be related to loss.

7 **THE COURT:** You identified what?

8 **MS. RICHMAN:** Extant materials that could be
9 potentially related to loss.

10 So August 2nd I sent a discovery request identifying that
11 there was remaining discovery due with contested issues at
12 sentencing, and each of these requests is aimed at contested
13 issues at sentencing. You know, first I said please help us
14 identify particular documents and information that are related
15 to your theory of loss and claims of obstruction. We were
16 grateful to Mr. Gray for agreeing to sit down with us and go
17 over that, and that was helpful; and, indeed, Mr. Gray has been
18 responsive in helping us locate trial exhibits that were
19 missing, other documents, and for that we thank him.

20 We were coming up on these hearings so we made sort of
21 standard *Giglio* and *Jencks* request. The second page of the
22 documents made requests for the materials for the QDE --

23 **THE COURT:** When you say the document, are you talking
24 about Exhibit 1?

25 **MS. RICHMAN:** Yes, Your Honor. I'll be more precise,

1 thank you.

2 The second page of Exhibit 1 identifies materials related
3 to QDE.

4 And, you know, the third page includes at Paragraph 5, you
5 know, that the Government has a continuing obligation to
6 produce documents and information relevant to sentencing,
7 including but not limited to the Government's loss or claims of
8 obstruction.

9 I want to take a pause right here, Your Honor --

10 **THE COURT:** When you say the claims of obstruction --

11 **MS. RICHMAN:** There are multiple claims of obstruction
12 that the Government has raised within its sentencing, the
13 most -- I'm trying to think of a word -- like, tightly
14 packaged, you know, the one that's just an issue, is the issue
15 relating to the purported fraudulent Guinther letter.

16 **THE COURT:** Okay. Because I think it would be helpful
17 because the classic one would be she testified.

18 **MS. RICHMAN:** Yes.

19 **THE COURT:** But when you say obstruction, I don't know
20 exactly what you mean.

21 **MS. RICHMAN:** I'm happy to clarify, Your Honor.

22 **THE COURT:** So the Guinther letter I understand.

23 **MS. RICHMAN:** The Guinther letter is one that really
24 has an evidentiary aspect to it and we had evidentiary hearings
25 on that. There are other claims of obstruction that the

1 Government has raised based on our client's trial testimony.

2 The Government also was heavily focused on the assertion
3 that our Government [sic] falsely reported aspects of her
4 personal history and characteristics, Officer Paige Cameron, in
5 reporting out that she had a history of emotional abuse and her
6 children had been also emotionally abused by Bobby Kimmel.

7 **MR. GRAY:** Your Honor, I think the defense counsel may
8 have misspoke. I think you just said the Government falsely
9 reported and you meant the Defendant falsely reported.

10 **MS. RICHMAN:** Thank you for the correction.

11 **THE COURT:** But I knew what you meant.

12 **MS. RICHMAN:** But I appreciate the clarification for
13 the record in any case. So there's sort of a lot that's sort
14 of softer, although we did have to undertake a significant
15 defense investigation to determine whether or not our client's
16 reports about those aspects of her personal history were borne
17 out in preparation for the hearing. But I don't want to get
18 back into sort of every aspect of it, but that is I think
19 what's encompassed in obstruction.

20 There's also an allegation that Ms. McComber's lawsuit
21 against Dwayne Preston for his accessing her systems at her
22 company in violation of 1030 has itself been obstructive. So
23 that's what the obstruction package kind of is, Your Honor.

24 But today I think we're just talking about loss. And when
25 we look at loss, you know, just a brief recitation of the

1 governing authorities here. The Government's discovery
2 obligations don't end at verdict, that's well established under
3 *Brady* and its progeny. We also know that materiality to guilt
4 or innocence is not necessarily the same as materiality to
5 punishment. There is a Fourth Circuit case, it is *Basden v.*
6 *Lee*, 290 F.3d 602, which makes clear that under *Brady*
7 non-disclosed documents are material to punishment if they
8 affect a sentence.

9 The simplest way to characterize the conversation about
10 loss is how much did she actually work. And so looking at Your
11 Honor's order, this is Docket No. 198. I do think I have some
12 additional copies.

13 **THE COURT:** Yes, that would be helpful. Or the deputy
14 clerk can print it.

15 **MS. RICHMAN:** I may have overpromised, Your Honor.

16 **THE COURT:** Okay. We can print it.

17 **MS. RICHMAN:** So my understanding of this, having
18 looked at the docket entry surrounding this, and the
19 transcripts of the hearings August 29th and August 30th, is
20 that this order sort of codified matters that were discussed
21 and decided upon at the end of that conference and that the
22 Government had begun to take steps in response to that sort of
23 on-the-record disposition prior to this order.

24 But in any case, looking at this we saw that it includes
25 that it was ordered that the NSA shall undertake to perform a

1 reasonable additional search for, and shall produce any
2 additional previously undisclosed records responsive to the
3 following categories of documents that the parties have
4 identified in their respective filings, and not already in the
5 possession of the defense, but which could contain exculpatory
6 material or evidence that would be subject to production under
7 Federal Rule of Criminal Procedure 16(a)(1)(E).

8 Within these categories some of them appear to speak
9 directly to loss, surveillance plan, correspondence about
10 offsite, onsite is less relevant, Your Honor.

11 **MR. GRAY:** I'm sorry, onsite is less relevant?

12 **MS. RICHMAN:** This is Paragraph 3. I'm just getting
13 myself organized, thank you. But I want to highlight the
14 particular paragraphs that I think are relevant to loss, Your
15 Honor. Any contractor annual performance evaluations --

16 **THE COURT:** Can you give me a paragraph number? It's
17 a five-page order.

18 **MS. RICHMAN:** Thank you, Your Honor. I'm on Page 3 of
19 Paragraph 5.

20 **MR. GRAY:** Your Honor, could I ask is it possible to
21 have a copy made so I could be looking at the whole thing. I
22 did not realize this was going to come up.

23 **THE COURT:** I didn't either. Sure. This is where
24 communication between the lawyers would be so helpful.

25 **MS. RICHMAN:** I agree, Your Honor. Unfortunately I

1 can dig through and try to find the order, but -- oh, thank you
2 so much. We appreciate the assistance of the courtroom deputy
3 with this.

4 **MR. GRAY:** Excellent.

5 **MS. RICHMAN:** So, Your Honor, Paragraph 5 on Page 3.
6 Mr. Gray, let me know when you're ready to go.

7 **MR. GRAY:** Sure.

8 **MS. RICHMAN:** Paragraph 5 talks to annual performance
9 evaluations, whether in draft or final form, project man plan
10 updates, resumés submitted to the government for review and
11 potential placement, monthly funding proposals or spend plans,
12 invoice approvals, related communications, emails or chats
13 regarding the addition of a --

14 **THE COURT:** Wait, I'm sorry, I'm lost. Were you still
15 on Paragraph 5 or did you move off?

16 **MS. RICHMAN:** Thank you for keeping my honest, Your
17 Honor, but no. Paragraph 5 is performance evaluations.

18 **THE COURT:** Right. I got that.

19 **MS. RICHMAN:** Six is performance --

20 **THE COURT:** Okay, so you're talking Paragraph 6 now?

21 **MS. RICHMAN:** Yes, Your Honor.

22 **THE COURT:** Okay.

23 **MS. RICHMAN:** Project management plan updates.
24 Paragraph 7 was a tradeoff study analysis which was some work
25 Ms. McComber undertook. Paragraph 8, resumés related to

1 staffing and hiring. Nine, funding and spend plans. Ten,
2 invoice approvals and related communications. Eleven,
3 information related to the addition of a subcontractor to
4 Ironbridge contract. Twelve, status reports. Sixteen, a slide
5 deck from July 2017 management review.

6 **MR. GRAY:** I'm sorry, where was status -- that's up in
7 12.

8 **MS. RICHMAN:** Status reports is at Paragraph 12. So,
9 Your Honor, when we had the opportunity to meet with
10 Mr. Gray --

11 **THE COURT:** Mr. Ahlers, I think, if memory serves me
12 correctly, well, this may not be correct, but I think an
13 enormous amount of energy was spent on Paragraph 14. Well, not
14 just as specific as what Paragraph 14 said, but it was the high
15 side emails that took a lot of time because there were ones
16 where someone is just copied versus someone who is the
17 individual to whom the email was sent or by whom it was
18 written.

19 **MS. RICHMAN:** Yes.

20 **THE COURT:** Anyway, I just am going from memory there.

21 **MS. RICHMAN:** You're correct, Your Honor. I do read
22 Paragraph 14 to be more specifically targeted.

23 **THE COURT:** Yes.

24 **MS. RICHMAN:** Which is why I did not call it out. But
25 there also was some understanding that there was a tranche of

1 emails out there with further communications by Ms. McComber
2 relating to the contract.

3 **THE COURT:** Right.

4 **MS. RICHMAN:** So we had an in-person meeting.
5 Mr. Gray prepared extensively for that meeting. He walked us
6 through the case and the relevant evidence. And we had that
7 opportunity to discuss in further detail some of the materials
8 that we had sought on August 2nd.

9 And we wrote to follow up on that meeting to memorialize
10 that discussion. And during that meeting I said, you know, is
11 it your position that you've produced all materials that are in
12 your possession under *Brady v. Maryland*? And Mr. Gray was not
13 prepared to make that proffer at that time. He turned to
14 Mr. Cooch during the meeting when we said, look, we want to
15 know about emails, we want to know about performance reviews,
16 or any records that should be produced in connection with just
17 the sentencing, Your Honor. We were not saying we want it all,
18 we want everything, we never have said that.

19 And I recall Mr. Gray turning to Mr. Cooch and saying,
20 well, yes, I think we could go take a look for that.

21 So, Your Honor, in the months intervening, of course
22 Mr. Gray encountered a lot of very challenging demands from his
23 work schedule, we're very sympathetic to those. However, we
24 did continue to try to press for materials that we needed. We
25 were really focused on trying to get those materials related to

1 the question document examiner, Your Honor. As you saw, they
2 form the basis of our cross-examination. I think I had to
3 submit, maybe, at least four requests to the Government before
4 they took a second look at what they had and produced them to
5 us.

6 And I understand now, and again I agree communication is
7 important, I understand now a little bit more of the context of
8 that having read Mr. Gray's submission. But, you know, we were
9 burning hot on lots of different fronts.

10 The Government's position seemed to change a bit over time
11 when we asked them to, you know, tell us what the status of our
12 request for those documents was. They said, well, I don't know
13 of anything. And we said, okay, well, can you make a
14 certification that it's not in the Government's possession?
15 And he demurred from doing so.

16 Then in December, in the days leading up to our request
17 for help, we encountered a new position from the Government on
18 those materials. And I think, Your Honor, that these are
19 within the Government's attachments to the Government's
20 ECF-filings, but I'm going to pass them up as defense exhibits
21 number 3 and number 4. Around this time we had been working to
22 find solutions for the aspect of this request that relates to
23 the emails, Your Honor. We were grateful to Mr. Gray for
24 working with us to see whether having Ms. Darrow visit the
25 facility to review the emails could be a sufficient solution to

1 that aspect of this discussion.

2 We made clear on the record, Your Honor, when we spoke
3 about this on November 20th that our request for Ms. Darrow's
4 review was not limited only to emails but also other materials
5 that the Government had collected but not produced. After that
6 on-the-record discussion, it became clear that the Government
7 would not make any other materials available during
8 Ms. Darrow's review.

9 In one of those communications for the first time, at
10 least that I've seen in writing, and I don't recall hearing it
11 before then, Mr. Gray expressed that the previous decision by
12 our client and her counsel to disavow pursuing any additional
13 production demands in January of this year in favor of moving
14 ahead with the January 23rd trial date, which we accommodated,
15 he wanted to stress that their willingness to have AFPD Darrow
16 review those emails didn't constitute a blanket commitment on
17 their part to produce any amount of material we might choose to
18 request.

19 It indicated, you know, what they thought would be
20 reasonable production requests from them. And reminded us to
21 be mindful of the burdens that our request would make on this
22 court and on the NSA.

23 **MR. GRAY:** I'm sorry, could you hold up for just a
24 second.

25 **MS. RICHMAN:** Of course. I believe you have a copy as

1 well, Mr. Gray. This is Defense Exhibit Number 3.

2 Just let me know when you're ready for me to take it down.

3 **MR. GRAY:** I'm good.

4 **MS. RICHMAN:** Great. And then email dated that same
5 day, which Mr. Gray helpfully prepared, to try to make
6 Mrs. Darrow's review of the emails onsite efficient and
7 productive, he, again, reiterated this position.

8 **THE COURT:** What position?

9 **MS. RICHMAN:** This position that we're preserving all
10 objections they have to further review production demands by
11 you based on the renunciation of these by your client and her
12 then-counsel in January of this year.

13 **THE COURT:** Has Ms. Darrow been out there?

14 **MS. RICHMAN:** Yes, Your Honor.

15 **THE COURT:** So Ms. Darrow went to NSA. She is, for
16 the record, an assistant federal public defender, I gather with
17 a clearance, and she reviewed only emails, is that what you're
18 saying?

19 **MS. RICHMAN:** Yes, Your Honor. She was given a
20 tranche of materials to review. I am a little confused now,
21 Your Honor, about why it was necessary for a person with a
22 clearance to review those emails. I think it might be a side
23 issue, but if we do go forward with any future reviews, I would
24 like clarification on whether we need to require Ms. Darrow's
25 time for that. Mr. Gray's description in the December 5th

1 letter -- I keep on giving things back to you, Crystal. So
2 this is the exact same set of materials, Your Honor, that my
3 client went and reviewed.

4 **THE COURT:** What are you showing us on the screen?

5 **MS. RICHMAN:** Your Honor, my apologies. This is
6 Defense Exhibit Number 4.

7 **THE COURT:** Okay.

8 **MS. RICHMAN:** This is a letter from AUSA Gray to
9 defense counsel dated December 5, 2023.

10 **THE COURT:** I think someone has to have a clearance
11 just to go there. That's always how it would seem to be it
12 worked.

13 **MS. RICHMAN:** Yes, Your Honor. I know nothing about
14 the world of NSA and clearance.

15 **THE COURT:** I don't know much but that seemed to be a
16 theme.

17 **MS. RICHMAN:** Yes. So this paragraph explains that
18 because your client's security clearance was suspended, once
19 the criminal charges were brought against her, she could not be
20 allowed access to a connected NSA terminal for the purpose of
21 conducting the review of her emails in December 2022. So that
22 they had taken steps, which Mr. Gray detailed, to prepare these
23 materials for her review.

24 Ms. Darrow was advised that she could not tell us about
25 the substance of these emails, but she did tell us that each

1 one was marked unclassified for official use only. I just want
2 to -- if we move forward with any sort of site-based review,
3 Your Honor --

4 **THE COURT:** I don't understand what you just said.
5 She couldn't tell you what she saw? What's the point of her
6 going?

7 **MS. RICHMAN:** Your Honor, there are safety -- again, I
8 rest on my statement about classified documents so I've been
9 learning this, along with this case. My understanding is that
10 because of the concern of potential classified materials mixed
11 into these documents that the protocol in place here would be
12 for her to make notes about things that were responsive in the
13 documents, for those to go through a period of review and
14 clearance by NSA, and then for those to come to us. After
15 receiving those, Your Honor, it seemed like what we would have
16 to then do was to provide a specified list of requests to
17 Mr. Gray, and in light of his statements that they were going
18 to undertake any production as narrowly as possible and only
19 where justified, it appeared there might be a period of
20 negotiation too for that.

21 **THE COURT:** But what you're telling me is she was
22 allowed to tell you there was information she understood would
23 possibly be important for your position?

24 **MS. RICHMAN:** She said, generally, that there were
25 some materials included within that set which could have

1 relevance to the issues of loss. We really appreciate NSA
2 making the review terminal available to her. We had given her
3 some key words and some key custodians that we wanted her to
4 look at. She wasn't able to search the documents using key
5 words and had difficulty even, when she filtered them by
6 custodian, or by the person who had been in the to or from
7 field of the document, she had trouble getting them into
8 chronological order. So it was a really challenging set of
9 circumstances and Ms. Darrow did her best. She's not read-in
10 on this case, we haven't added her.

11 After a few hours, in light of these considerations, it
12 seemed like pursuing these emails was going to take a great
13 deal of time, and we made the decision to pull her down and not
14 ask her to go through the emails page-by-page. By that time,
15 Your Honor, that she made it out to campus, this discovery
16 conference had been set so I thought it would be a useful
17 opportunity to figure out, you know, if there are onsite
18 reviews ordered by this court, what material will be reviewed,
19 who can go and review it, and what will the Government be able
20 to produce.

21 Mr. Pine, I want to thank him, had set aside, I think, two
22 and a half days for Ms. Darrow to come out there, and we really
23 appreciate it.

24 **THE COURT:** So who's here from NSA?

25 **MR. GRAY:** Your Honor, Jim Pine, who is seated in the

1 back of the courtroom. He is a member of the Office of the
2 General Counsel at NSA and has been serving as our principal
3 contact person on this matter I want to say since approximately
4 probably spring of 2022 when he replaced his predecessor
5 Mr. Crookshank. And Mr. Pine I'm sure is honored to be
6 returning to this courthouse where he served as an assistant
7 united states attorney for a number of years.

8 **THE COURT:** Thank you. I did wonder if we had anyone
9 here from NSA. But what I don't like to hear, and I'm not
10 saying this happened, but there's a dichotomy between what the
11 Government thinks is necessary to prove its case, what the
12 defense thinks is necessary to prove the defense. And my point
13 would be that NSA can't have it both ways. So if NSA wanted to
14 prosecute Ms. McComber then it has to figure out a way to make
15 this material available. And it's frustrating to hear all the
16 obstacles. It just is.

17 I mean, the one thing so far that really is bothering me,
18 if you want to pursue the case then you have to do it in a way
19 that makes it so the defense has a chance to pursue whatever
20 its defense might be, subject to I'm certainly sensitive to the
21 need for secrecy where it's appropriate. But I'm hearing more
22 roadblocks than I'm liking.

23 **MS. RICHMAN:** Thank you, Your Honor. So we --

24 **THE COURT:** But I said that earlier. This isn't the
25 first time. And Mr. Pine is acknowledging that, he just nodded

1 in the affirmative. That's also been the point. But I thought
2 that the system was working and I thought that it had been.
3 What you're describing with respect to Ms. Darrow doesn't seem
4 to fit what I thought had been the process that had been in
5 place. And I thought a Herculean effort had been made by NSA
6 to accommodate what -- I look at that order and it's
7 overwhelming what Mr. Ahlers was able somehow to persuade me to
8 agree to.

9 Well, Your Honor, I think -- I want to be fair to NSA. I
10 do think they did a lot in the fall.

11 **THE COURT:** Yes, I agree. That's what I was trying to
12 say. This order is daunting.

13 **MS. RICHMAN:** And I want to talk a little bit more
14 about that briefly in a moment. But just to close the thread
15 on Ms. Darrow, Your Honor. I was asking a great deal of my
16 colleague, who is a busy felony attorney, to set aside this
17 much time to review the documents. I was asking a great deal
18 of Mr. Pine to sit there with her while she did it. It did not
19 seem like it would be productive to continue through that
20 exercise until we reached resolution with this Court, again,
21 about if the Court decides further onsite review is necessary.

22 If the Government is not willing today to represent that
23 it feels comfortable it has fulfilled its discovery obligations
24 to Ms. McComber with respect to sentencing, which, again, we
25 will take the Government at its word, Your Honor, then, you

1 know, I think that --

2 **THE COURT:** Well, the problem with that request is
3 your views of what is necessary for sentencing aren't the same.
4 So if he were to even -- I mean, I've had lawyers stand before
5 me and say the Government has met its *Brady* obligations, but
6 they may not be on the same page as the defense as to what was
7 *Brady* material, in a case like this that's for sure.

8 **MS. RICHMAN:** And, Your Honor, if the Court views it
9 as appropriate, I'm trying to decide whether it would be worth
10 seeing if there could be a meeting of the minds with the
11 Government and the defense about what that conclude. But I've
12 not asked to define it. I told the Government that if they say
13 they've done it, they've done it.

14 I know Mr. Gray. He's been an assistant United States
15 attorney for a long time. He focuses preliminarily on
16 white-collar cases where issues of evidence and *Brady* come up
17 often. And I respect and rely on that, Your Honor. So if the
18 Government will make the representation, we will take him at
19 his word.

20 If we do continue to, as a result of this hearing, on any
21 path of further review or production then I think we should
22 just put a clear timeline in place and put really express
23 parameters in place for it.

24 I want to just before I --

25 **THE COURT:** Can I ask you this, let's go back to the

1 order at ECF-198 and you identified certain paragraphs. Is it
2 your position that each one of these items -- you started with
3 Paragraph 5 -- are pertinent to sentencing?

4 **MS. RICHMAN:** Yes, potentially, Your Honor. Let me
5 show an example. And let me just back up a minute. And this
6 is what I think what I was referencing when I mentioned that I
7 do believe --

8 **THE COURT:** Could you tell me why number 7, for
9 example, would be relevant?

10 **MS. RICHMAN:** Your Honor, because it looks like it's a
11 study that was produced by InfoTek and delivered to NSA during
12 the indictment period; included meeting notes and other work.
13 So I think it would show a specific project that Ms. McComber
14 spent a specific number of hours completing.

15 **THE COURT:** Well, it says produced by InfoTek. It
16 didn't say produced by Ms. McComber so I'm just asking.

17 **MS. RICHMAN:** I'm happy to get further information --

18 **THE COURT:** Some of these, as I say, I can't go back
19 in time, really, and tell you on November 16 of 2022 exactly
20 what I was thinking. I may be wrong, but my memory is this was
21 a narrower list than that which Mr. Ahlers actually sought.
22 There was almost nothing he didn't seek.

23 But as I look at it today, I'm troubled as to how that has
24 anything to do with the loss?

25 **MS. RICHMAN:** We can certainly -- we've always told

1 the Government we were only seeking materials that are relevant
2 material to loss. Your Honor, this is sort of the vast world
3 that we knew was being collected, and we think that there's
4 potential for materials within this set to be relevant to loss.
5 I think certainly an outcome of this hearing, if there is
6 further work the Government feels it must do, would be to
7 narrow this to just sort of the most pressing thing.

8 Our prior requests, Your Honor, sort of have called out
9 what we think the most pressing items are, including, you know,
10 status reports and evaluations.

11 **THE COURT:** So the way I looked at this, as you were
12 speaking about it, was what I thought you were trying to find
13 was whatever information would reflect that she was working
14 offsite.

15 **MS. RICHMAN:** Yes.

16 **THE COURT:** And these are broader than that. For
17 example, any project management -- this should Paragraph 6 --
18 any project management plan updates to the Ironbridge contract
19 submitted by InfoTek personnel -- it says InfoTek personnel,
20 not Ms. McComber -- from March 1, 2016 to September 30 of 2017.
21 Why Mr. Ahlers wanted that I have no idea, but somehow he
22 persuaded me to allow that.

23 Thank you, Your Honor. And I understand that, again, we
24 are not seeking the full extent.

25 **THE COURT:** Right. That's why I had said at the last

1 hearing, couldn't you -- both sides talk to each other. I
2 mean, you don't need me to point out to you that this is not
3 about necessarily Ms. McComber. It was much broader than that.

4 **MR. GRAY:** I'm sorry, Your Honor, just a question if I
5 could, what was the particular item in this order you were just
6 talking about?

7 **THE COURT:** I was talking specifically about -- let me
8 get back there. I was talking about number 6, Paragraph 6 and
9 number 7. First 7, then 6.

10 **MS. RICHMAN:** I've just received a note from my team,
11 Your Honor, with respect to the tradeoff study analysis in
12 particular, which is reporting that at trial Ms. McComber
13 testified about that study and that she led and worked that
14 study extensively. Your Honor, I think that the line between
15 offsite and onsite can bleed. I'm onsite right now. I'm going
16 to spend about two hours here. Unfortunately all of us have
17 spent many offsite hours preparing to be here today. So
18 materials that are submitted, finalized, only in NSA's
19 possession, can still speak to offsite work.

20 The project management plan updates, I want to show an
21 example of one document we've received that looks like
22 something along those lines. This document, Your Honor, was
23 produced in November of 2022. I'm marking this as Exhibit
24 Number 6.

25 I want to be clear, Your Honor, I'm still getting,

1 unfortunately, I hate to admit this, I'm still learning what
2 all of the different terms used by folks in this case mean. So
3 maybe my client is going to tell me after this that this is not
4 a project management plan or an update. Maybe she'll tell me
5 it's closer to a status report.

6 But this document is something that is called a stoplight
7 report. So I'm turning to Page 2.

8 **THE COURT:** A what kind of report?

9 **MS. RICHMAN:** They call it a stoplight chart. This is
10 not terminology that I have used, Your Honor.

11 Court's indulgence.

12 One moment, Your Honor.

13 Okay. So the metrics on this monthly stoplight -- and I'm
14 glad you have a copy because the text is small and I'm not the
15 best at focusing on this -- they appear directly related to the
16 work that Ms. McComber was doing as project manager of the
17 contract and therefore relevant to loss.

18 This example shows that all contract deliverables,
19 including those of project manager, were delivered on time and
20 of requisite quality, that the contract was adhering to the
21 staffing plan. And that the contract had 14 full-time
22 employees. That there was zero attrition for that month but
23 there was one position still open. And that it would be
24 Ms. McComber's responsibility to fill that which, Your Honor,
25 is offsite work as testified to and in evidence in this case.

1 There was a metric for whether Ms. McComber was responsive
2 to issues. And there is a free-form comment section about
3 mission performance, outcomes talking about status management
4 of TTOs and funds obligated.

5 **THE COURT:** Just to be clear, is this something that
6 was produced before trial or since trial?

7 **MS. RICHMAN:** This was produced before trial. It was
8 produced in connection with the NSA's search that it undertook
9 after August and pulled the plug on.

10 **THE COURT:** But before the trial?

11 **MS. RICHMAN:** Yes, this one was.

12 **THE COURT:** Mr. Ahlers had this for the trial.

13 **MS. RICHMAN:** I'll make the record clear that he had
14 this for trial. But I will note that it states that it's a
15 monthly contract status report, Your Honor, and that we
16 received only one. We wonder whether there are others, other
17 monthly status contract reports perhaps for months during the
18 indictment period that would similarly include detailed
19 information reflecting on the amount of hours that Ms. McComber
20 was working.

21 When we look at what the Government was doing, what NSA
22 was doing, in collection with its correction efforts, Your
23 Honor --

24 **THE COURT:** Mr. Ahlers made much of the topic of
25 deliverables and acceptance by the Government. That was a big,

1 I think, theme of his that if the Government accepted it it
2 must have been done.

3 **MR. GRAY:** If they accepted the hours.

4 **THE COURT:** I'm sorry?

5 **MR. GRAY:** If they accepted the hours.

6 **THE COURT:** The hours, right. I should have said that
7 more clearly. Yes.

8 **MS. RICHMAN:** Your Honor, I think that we plan to make
9 a more -- I think that's -- I don't want to imply that
10 Mr. Ahlers' theory was not fact-based, it is fact-based. We do
11 think it is significant that the Ironbridge contract performed
12 well and that Ms. McComber was viewed as doing a good job at
13 it. But that's not the theory we're in pursuit of here. We're
14 trying to put a finer point on it because now there's this
15 discussion, well, how much was she actually working, right? If
16 it wasn't all the time. If the jury has found that there's
17 material falsity, what does that mean for her restitution
18 obligation? What does that mean for loss?

19 **THE COURT:** But I don't think this -- this document
20 wasn't introduced in evidence, was it?

21 **MS. RICHMAN:** This one was not, Your Honor. But
22 again, Your Honor, I think that there are materials that can be
23 relevant at sentencing that might not have been --

24 **THE COURT:** No, I understand that. I was just
25 clarifying that.

1 **MS. RICHMAN:** Thank you, Your Honor.

2 Do you have any other questions, Your Honor, about the
3 stoplight chart before I move on?

4 **THE COURT:** No. Other than, just to be clear, your
5 concern is it says monthly so where are the rest of them?

6 **MS. RICHMAN:** Right. And I understand that this was
7 produced in connection with this effort to collect different
8 custodians.

9 **THE COURT:** But could you help me here, to clarify for
10 me, what does -- at least as I understood it the issue -- and
11 if I misstate this I know you'll correct me and I'll ask
12 Mr. Gray to do the same -- but it was understood that some work
13 could be done offsite.

14 **MS. RICHMAN:** Yes.

15 **THE COURT:** And the Government never said otherwise.
16 The question was what could be done off site? And most of the
17 work, at least as I think the theory of the Government's case
18 was, that all the substantive work had to be done onsite. The
19 kinds of things that could be done offsite were pretty limited.
20 I think billing could be done offsite. Interviewing could be
21 done offsite. Reviewing resumés could be done offsite. But
22 the hardcore work of the contract had to be done onsite, right?

23 **MS. RICHMAN:** Uh-huh.

24 **THE COURT:** So what does this show? Why do you think
25 this is relevant to loss?

1 **MS. RICHMAN:** Because I think there's a question of
2 how much work --

3 **THE COURT:** What is on here is what I'm saying?
4 You're saying you didn't get more than this one example, I'm
5 asking you what does the one that you do have show you on loss
6 would lead me to say let's go hunt for the rest of them if they
7 exist? And it came out, again my memory will stand corrected
8 by the record, but there were periods of time where status
9 reports weren't sent, even though they were as I understood
10 it's supposed to be. So the fact that it's called a monthly
11 status report doesn't guarantee that they were really submitted
12 every month, I suppose. But regardless, what does the one that
13 you have show that you think makes it relevant to loss?

14 **MS. RICHMAN:** Thank you, Your Honor. First, I want to
15 state that I think that your recitation of the Government's
16 theory at trial and offsite versus onsite is correct. I think
17 that now we're at the request of what amount of hours. The
18 Government has advanced a theory in its sentencing memo,
19 15 percent. And we are not -- this is not going to exactly at
20 trial, but we think she did more than was introduced at trial.

21 We think there's evidence out there to show that there was
22 more offsite work for her available to do. We think it is
23 properly taken into consideration by this Court at sentencing,
24 and it is proper for us to have the opportunity to present that
25 information to rebut the Government's theory of loss.

1 Looking specifically at the stoplight chart. There's a
2 lot of dispute about staffing and hiring, Your Honor. It
3 occupied a lot of Ms. McComber's time offsite. In this
4 particular report, the discussion about the open position --

5 **THE COURT:** I'm sorry, where are you?

6 **MS. RICHMAN:** Court's indulgence.

7 It's on the first page, this is nearly impossible to read
8 and I don't have my reading glasses. Okay. There's a line --
9 I'll just point --

10 **THE COURT:** I have it in front of me.

11 **MS. RICHMAN:** I'm trying to figure out a way --

12 **THE COURT:** Sure. If you give me the heading I'll go
13 to it.

14 **MS. RICHMAN:** Sure. U, staffing.

15 **THE COURT:** Okay. Let me get there. I see funding,
16 cost type contracts, invoicing, schedules. Oh, the U,
17 staffing. I see it.

18 **MS. RICHMAN:** So if you look at the row that begins
19 with the paragraph vacated.

20 **THE COURT:** Yes.

21 **MS. RICHMAN:** So it says then there's a vacated
22 full-time equivalence during the reporting period. It has
23 beginning full-time equivalence for the reporting period. It
24 has ending full-time equivalence for the reporting period. It
25 looks like the beginning of the period it was 13 full-time

1 employees. At the end there were 14 full-time employees and
2 there's a note. One position still open due to losing chief
3 architect.

4 It would be Ms. McComber's job to recruit, interview, and
5 hire the person to fill this role.

6 If I may have a moment to confer with my team really
7 quickly.

8 My team is reminding me to emphasize that in the statement
9 of work, which was discussed at trial, that her --

10 **THE COURT:** Is this another category?

11 **MS. RICHMAN:** No, Your Honor. It's explaining why
12 this is part of her work.

13 **THE COURT:** Oh.

14 **MS. RICHMAN:** -- that her tasks include managing
15 staffing.

16 **THE COURT:** I think that was established.

17 **MS. RICHMAN:** Okay. So this is why, you know, this
18 document drew our attention as being potentially relevant to
19 loss and sometimes it's --

20 **THE COURT:** But, I'm not trying to be difficult, but
21 you just told me that you think this would establish -- this is
22 relevant to loss. And it absolutely was established, I think,
23 at trial that she was interviewing people for jobs.

24 **MS. RICHMAN:** Right.

25 **THE COURT:** The question is how much time did that

1 really take, how many interviews did she really conduct. Okay.
2 So you have one --

3 **MS. RICHMAN:** Exactly, Your Honor. Exactly. That's
4 sort of, unfortunately, the sort of brass tacks of this
5 exercise of trying to figure out loss is useful to understand
6 and it can have an affect on her sentence.

7 **THE COURT:** I mean, on its face, and I'm not making
8 any rulings, I'm just saying on its face if the Government was
9 allowing, if you will, in its mind 15 percent, this doesn't
10 stand out as, oh, they're wrong, it must have been more than
11 15 percent because there was one vacancy.

12 **MS. RICHMAN:** Sure. Any document in isolation, Your
13 Honor --

14 **THE COURT:** Right.

15 **MS. RICHMAN:** -- I do not think would do the job of
16 overcoming the Government's theory of loss. But the Government
17 has repeatedly disputed that staffing was billable. The
18 Government has repeatedly --

19 **THE COURT:** I don't know if I agree with that.

20 **MR. GRAY:** Your Honor, if I can clarify that for a
21 second. Couple of reasons we've raised questions about that
22 and I'll deal with one of them more later on. One of the most
23 fundamental ones is she has a number of contracts that she's
24 looking to find people to find people to staff on, including
25 Silent Roar at NSA and various other contracts in addition to

1 that.

2 So there might have occasionally been some time and
3 perhaps she was specifically looking for someone on the
4 Ironbridge contract, but I believe in general the evidence was
5 that she -- I think they had an outside recruiting firm for
6 sure. I think they had some in-house recruiters, according to
7 Jason Doyle's testimony which we referred to in the opposition
8 to the Rule 29 motion. So that was sort of the question is,
9 okay, she's doing a certain amount of recruiting work. She
10 shares that recruiting work with other people. Can you tie
11 that recruiting work specifically to the Ironbridge contract?
12 And I think that's -- there's not enough detail to do that.

13 **THE COURT:** Okay. Well, here we have a document that
14 was produced before trial that shows there was a vacancy.

15 **MS. RICHMAN:** Yes. Thank you, Your Honor. We
16 actually agree with Mr. Gray's characterization. The
17 Government is disputing, you know, factually how much of this
18 time was dedicated to Ironbridge, which is why it does make
19 documents that put a factual point on that of material interest
20 to us.

21 What we know is --

22 **THE COURT:** Well, maybe Mr. Pine will be able to tell
23 me, I don't know if this is his bailiwick, why only one such
24 report was produced if there were others?

25 **MR. PINE:** I don't think I can shed any light on that,

1 Your Honor.

2 MR. GRAY: Your Honor, I can --

3 MS. RICHMAN: I'm prepared to look at what the record
4 shows, Your Honor. If you don't mind I was about to go to an
5 exhibit about that.

6 THE COURT: Okay. Just remember this, Mr. Gray, that
7 I asked this question when it's your turn. Thank you,
8 Mr. Pine.

9 MS. RICHMAN: Your Honor, this is ECF No. 196.
10 Ms. Weeks, did I give you a copy of this?

11 MS. WEEKS: Yes. 5.

12 MS. RICHMAN: We're going to mark this as Exhibit 5.

13 THE COURT: Thank you.

14 MS. RICHMAN: So based on the record that was
15 established by the status reports submitted in the fall and
16 January of 2022 to '23, it helped me gain an understanding of
17 what NSA's specific search was, what their specific productions
18 represented. I understand that Mr. Cooch was leading many of
19 these efforts.

20 So on November 11th of 2022, the Government submitted a
21 status report about searching and producing documents from the
22 NSA in response to various requests. That's in the first
23 paragraph here (indicating.) It includes a recitation of the
24 categories but if you look, Your Honor, to Page 4 there's a
25 paragraph, the third paragraph down, the status report reflects

1 that the NSA had prioritized reviewing the data of 11 key
2 individuals, including the CORs, contracting officer's record
3 and contracting officer representatives -- I caught myself on
4 that one -- and contracting officers, with primary
5 responsibilities for the Ironbridge contract during the
6 indictment period.

7 And this is a world I once knew well. I left civil
8 practice but the star of responding to a discovery request is
9 always identifying who are the custodians, the people who have
10 the documents, and then determining what to search them for.
11 And it sounds like here, early in the letter it says there were
12 27 different people they thought could have responsive
13 documents but there's these 11 priority individuals.

14 And if you look in the note, footnote 3.

15 **THE COURT:** Look at what?

16 **MS. RICHMAN:** Footnote 3 on Page 4, it states who
17 these individuals are that they had prioritized for collection.
18 I think the Court will probably recognize many of those names
19 because many of them were Government witnesses at trial.
20 Kristin Mair, Jonathan Smith, Jason Doyle, Regina Shirley,
21 Tiffany Starr-Smith, Donald Pugh, Megan Collins, Cherri
22 Guinther, Rob Bryant and Jason Clark. So in this November
23 letter, the status was we're getting what these people have.

24 So it appears that the stoplight report that was produced
25 the day before seems to have come from somebody's -- some

1 custodian's files that had been gathered up and searched for
2 the first time. We also see here that that's gathering the
3 collection of custodians and searching is continuing.

4 For that reason that one report, you know, leads us to the
5 question of were there materials like that that were collected
6 from these custodians are now in the Government's possession.
7 We agree it's hard to prove or disprove the Government's loss
8 figure on a document-by-document basis. There is no one
9 document. It is cumulative, Your Honor. We are putting
10 together what we have on that. There is evidence that was not
11 used at trial that is relevant to that. And we have asked the
12 Government to tell us whether there's any other evidence like
13 that currently in its possession, custody, or control. And we
14 think that those 11 people would be people who would be very
15 likely to have it.

16 So we wanted, as an exercise of due diligence, the
17 Government to tell us yes or no. If they're not there, they're
18 not there, Your Honor, and we can all move on and bring this
19 case to completion. So, again, I would welcome the Government
20 clarifying its position on this. But --

21 **THE COURT:** My memory, which once again I confess
22 could readily be faulty, is -- and it may vary from
23 person-to-person, some of these people aren't there anymore.

24 **MS. RICHMAN:** Right.

25 **THE COURT:** We know for example Ms. Guinther isn't.

1 But it was a shared drive and so the notion that there's --
2 each of these people have his or her own file I'm not actually
3 sure that's even been established. But, again, I may be wrong.

4 **MR. GRAY:** Your Honor, if I may just clarify that
5 quickly --

6 **MS. RICHMAN:** I have these --

7 **MR. GRAY:** -- that was a fundamental partly of
8 Mr. Stein's sort of theories and which were then transmitted to
9 Mr. Ahlers that every one of these CORs should have had a,
10 like, a separate file that they kept and then transferred over.

11 As you may recall, Mr. Stein actually hadn't been in,
12 like, a contract officer position for nearly 30 years at that
13 point. And the testimony, I'm pretty sure there was testimony
14 to it, certainly what we discovered in the discovery process
15 going through all of this, or the document production process
16 rather, was that everything went into a shared drive as Your
17 Honor says, so. . .

18 **THE COURT:** Okay. Thank you for refreshing my memory.
19 That's why I had that recollection.

20 **MS. RICHMAN:** Thank you, Your Honor. It's taken me
21 awhile to figure out how this all worked as well. But one of
22 the things that's been really useful for me in navigating this
23 is looking to the extensive testimony that was given by Kelly
24 Sulewski. Forgive me, Your Honor, I don't recall her exact
25 role, but I think she played a significant role in the

1 collection of documents in this case. She testified, and I can
2 provide excerpts of this to the Court if it would like it.

3 My commitment to double-side printing is making this
4 awkward for me.

5 She testified in general that there were shared files,
6 that each contract officer representative had a share file.
7 They had access to different share drives. And she testified
8 that the Government had not gathered or looked into those
9 places yet.

10 She also testified --

11 **THE COURT:** Where do I find her testimony? What
12 transcript?

13 **MS. RICHMAN:** This is ECF No. 162, Your Honor.

14 **THE COURT:** I mean, I would think it's analogous to we
15 have case files, you go to the docket and everybody can see the
16 same things that are filed but that doesn't mean someone
17 doesn't also have his or her own personal file possibly. But
18 then again, if you don't have a reason to have a duplicate
19 because you just docketed it, we get rid of it.

20 **MS. RICHMAN:** Right.

21 **THE COURT:** Possibly would keep something that doesn't
22 get docketed. But if it's docketed you don't keep it in your
23 file.

24 **MS. RICHMAN:** Absolutely, Your Honor. And I think
25 that Ms. Sulewski's testimony on the whole throws light at what

1 was happening at NSA. I think there are many acknowledgments
2 throughout the record of things not always happening when it
3 came to filing in exactly the way it should on paper. But what
4 Ms. Sulewski did say during her testimony that contracting
5 officer representatives did maintain files. She testified that
6 things like performance reviews could be stored in multiple
7 places, including the COR file and the contracting office file.
8 That she had never been asked to look in a contracting officer
9 representative file and she had never seen one.

10 So I think that's why these custodians were collected
11 because the shared drives hadn't been looked at as of that
12 point. That is my understanding, Your Honor.

13 So going back to loss and sentencing, the status reports
14 the Government provided lasts up until I think the day before
15 trial, Your Honor. And as of that date they still said they
16 were working to collect custodians to gather documents, which
17 is why as an exercise of due diligence and fulfilling my
18 responsibilities in representing Ms. McComber in this case I
19 made the request for Mr. Gray to provide us with materials that
20 were related to loss in advance of sentencing and have raised
21 this request. And when we were eager for clarification on
22 what --

23 **THE COURT:** And could you tell me what documents you
24 think are related to loss because that's an important point.

25 **MS. RICHMAN:** I think that status reports, like the

1 stoplight report that I just showed you are relevant to loss.
2 There's been this lingering issue of performance evaluations,
3 Your Honor. And in connection with this production effort
4 there are many drafts for the first time produced to the
5 defense of performance evaluations. I don't think they were
6 final. And there's differences between some of those. And
7 those are reports that are specifically looking at the
8 performance of the project manager.

9 Those are sort of the clearest categories. I think there
10 was a program management review in July of 2017. That's
11 another document that came out during that production period.
12 There are emails indicating that it wasn't a one-time thing.

13 Your Honor, I don't know whether these exist or not, which
14 is why I've been asking the Government to tell me whether or
15 not the Government has document like this. And we've specified
16 since August 24 --

17 **THE COURT:** If Mr. Gray has those and doesn't turn
18 them over that would be disturbing. The question I thought we
19 were focusing on is the effort you, you and really your
20 predecessor, the request of the Government to search to find
21 these things if they existed. If Mr. Gray has them, I can't
22 picture that he wouldn't have turned them over. I can't speak
23 for him, I have no idea. But that would be very upsetting to
24 me. I really thought the focus here was, does NSA have these
25 things, not does Mr. Gray have these things.

1 **MS. RICHMAN:** Oh, sure, Your Honor. Maybe I'm
2 speaking too generally but I think that the NSA and the OIG are
3 certainly part of the Government's prosecution team --

4 **THE COURT:** No, no, I thought you said Mr. Gray had
5 them and didn't turn them over.

6 **MS. RICHMAN:** Let me be clear, Your Honor.

7 **THE COURT:** Because this is why I used this
8 description earlier. The discovery requests of your
9 predecessor were so incredibly voluminous that it's no wonder
10 that it was going to take the amount of time it took. I didn't
11 grant every request he made, but I granted probably way too
12 many. That's what he asked for, I narrowed it. Somehow I
13 granted as much as I did and that really snowballed because
14 those requests are so demanding. And then there's the NSA
15 overlay of the process they follow. I'm not here to tell NSA
16 how to guard our national secrets. If they have a process they
17 have to follow, they have to follow it. And that's time
18 consuming and everybody knew that going into it.

19 **MS. RICHMAN:** Thank you, Your Honor. So I think that
20 unless you have further questions, maybe I'll close by saying
21 specifically what we would like --

22 **THE COURT:** Yes, that would be really helpful.

23 **MS. RICHMAN:** -- the Government to represent.

24 **THE COURT:** No, I want to know what you want.

25 **MS. RICHMAN:** I want any documents that are --

1 **THE COURT:** You can't tell me I want any documents
2 related to loss because that is too amorphous and too vague. I
3 don't know what you think amounts to showing what would be
4 relevant to loss versus my view of what would be relevant
5 versus Mr. Gray's view. I need concrete information.

6 What are you actually -- you know what's out there because
7 you've seen the descriptions, what is it you think you're
8 entitled to that you didn't get?

9 **MS. RICHMAN:** I don't trust myself to make a complete
10 list here, Your Honor.

11 **THE COURT:** You told me status reports.

12 **MS. RICHMAN:** We are seeking the items that are
13 material to punishment that would affect the sentence here. We
14 think that performance reports, we think that -- performance
15 evaluations.

16 **THE COURT:** Performance evaluations for the indictment
17 period.

18 **MS. RICHMAN:** I'm just going to ask Ms. --

19 **THE COURT:** Sure, sure. This isn't a criticism, but I
20 have felt that it's either too broad or too vague for me to
21 really know what you wanted.

22 **MS. RICHMAN:** I am sorry.

23 **THE COURT:** Other than this one issue that ultimately
24 was resolved about the security file.

25 **MS. RICHMAN:** Thank you, Your Honor. The project

1 management reports, this seems like a big read-out where
2 there's PowerPoint presentation and meetings.

3 **THE COURT:** Wait, wait, wait. Let me stop you there.
4 You're asking for a PowerPoint presentation?

5 **MS. RICHMAN:** No, I think that we had -- we got in
6 discovery a project management read-out which was a meeting
7 that had with it a PowerPoint, but I think evidence of that
8 project management review occurring and any products created by
9 those meetings that show with particularity the work that our
10 client was performing.

11 Monthly status reports, monthly -- these are contracting
12 officer representative status reports. I think there are also
13 technical status reports that we've now found one example of,
14 but status reports in general. I think I said performance
15 evaluations.

16 materials that are related to how much hiring, recruiting,
17 and staffing was going on with respect to the Ironbridge
18 contract. Stoplight charts seem to fall within that category.

19 I'd like to reserve, Your Honor, should you decide to
20 craft a particular outcome here that requires a specified
21 search by the Government to supplement this list with specific
22 items if needed in writing on the record.

23 **THE COURT:** Okay. Thank you. And it's 11:20-ish.
24 Does anybody need -- I don't need a break. But I also know
25 other people are not me. So is there anyone who needs a break

1 before I call on the Government because we have to be done by
2 1:00.

3 **MS. RICHMAN:** I have to call my husband now because I
4 don't think we're going to be done by noon. And I think I need
5 to ask him to move his 1:00 call. If you would give me a brief
6 moment.

7 **MR. GRAY:** If we can take a 10-minute break that would
8 be --

9 **MS. RICHMAN:** It will take me two minutes.

10 **THE COURT:** I will give everybody a brief recess.

11 **THE CLERK:** All rise. Court stands in recess.

12 **(There was a break at 11:24 a.m. to 11:33 a.m.)**

13 **THE COURT:** So we're ready then for the Government.

14 **MR. GRAY:** Yes, Your Honor.

15 **THE COURT:** So is there any problem in granting that
16 request that they're asking for, or can you verify that it's
17 been provided? Just to cut to the chase, Mr. Gray, and then
18 I'll let you basically do it your way.

19 **MR. GRAY:** Your Honor, if I can slightly paraphrase
20 former President Bill Clinton, it depends on what the meeting
21 of "it" is. That's always been the nub of the matter in
22 responding to these requests from the defense. That they have
23 been --

24 **THE COURT:** But now it seems a lot narrower, possibly.

25 **MR. GRAY:** I doubt it. The more serious problem is

1 that it's already been addressed and moreover there's --

2 **THE COURT:** Well, okay, let me just ask you this, and
3 I do want to give you a chance to present the way you prepared
4 to present. So I was just trying to short circuit this a
5 little bit if I could.

6 To illustrate, Ms. Richman says that the only monthly
7 status report -- this is Defendant's Exhibit 6, CM monthly
8 contract status report -- the only one they got is the one
9 that's been marked as Defense Exhibit 6. Mr. Ahlers had it and
10 didn't use it at trial, but that's neither here nor there at
11 this point. It's dated September 16 of 2016. It's called a
12 monthly contract status report, which raises the question of
13 whether indeed there are more of them and, if so, where are
14 they.

15 So the defense believes it's relevant because this
16 particular document just to use it as the example, it's the
17 only one they have, indicates there's an opening, and that's on
18 the document, and that would support their argument that
19 Ms. McComber had work to do that she could do offsite and that
20 would be relevant to the loss.

21 So where are the rest of them?

22 **MR. GRAY:** Okay. So the short answer to that, Your
23 Honor, is when a question about this was raised either by
24 Ms. Weeks, or I responded to Ms. Weeks on it, I went back to
25 the NSA and I said, "Do we have these for other months?" And

1 they say no.

2 **THE COURT:** Do we have these what, I'm sorry?

3 **MR. GRAY:** Do we have these for other months, and they
4 said, "No, this is the one that was found." There was only one
5 that was found. This was -- it would have been covered by Your
6 Honor's Order of November 16th, 2022. So pursuant to that, it
7 was searched for by the people. It was one of the categories
8 of things that were searched for by the people at the NSA.
9 This is the only one that was found. They didn't find any
10 others. So that's the first thing. It's been searched for;
11 what was produced was found. Done as to that issue.

12 Now, let's discuss the significance of this issue, which
13 as the Court knows was not introduced as an exhibit by prior
14 counsel at trial.

15 **THE COURT:** Well, before you get to the significance,
16 that really -- I'm not ready to talk about that yet. I was
17 trying to understand what exists and what effort has been made
18 to find it, then we can discuss whether it's relevant.

19 So what you're telling me is NSA undertook the review
20 pursuant to my order of November 16, 2022, ECF-198, and that's
21 the only one that was found?

22 **MR. GRAY:** Yes. That is correct, Your Honor.

23 **THE COURT:** And then the defense asked also for -- we
24 were just getting a list from Ms. Richman of exactly what they
25 want -- and performance evaluations.

1 **MR. GRAY:** Yes, Your Honor.

2 **THE COURT:** Project management report regarding
3 Ms. McComber's work. The technical status reports, information
4 as to hiring, recruiting, and staffing and the stoplight
5 charts, which I think that's what this was that I already
6 mentioned. Those are basically the categories she just focused
7 on.

8 **MR. GRAY:** Yes, if I can ask Your Honor to -- if I
9 miss any of these as I'm responding, if you could prompt me
10 from your list. Let's take them one at a time.

11 **THE COURT:** But I guess what I'll say now, Mr. Gray,
12 the one that stood out was the Defense Exhibit 6 which has got
13 a title of monthly in it, and there was only one that was ever
14 produced. The rest of them I think you can address as you go
15 along.

16 So why don't you now proceed in the way you had planned
17 and then if you don't mind, when you do so at the appropriate
18 time, can you address the specific requests made by
19 Ms. Richman.

20 **MR. GRAY:** I just want to confirm that 6 is the --

21 **THE COURT:** Defense Exhibit 6 was the stoplight chart.

22 **MR. GRAY:** I may be missing -- oh, yes, I'm missing
23 the initial cover page.

24 **THE COURT:** It's called a monthly contract status
25 report.

1 **MR. GRAY:** Yes.

2 **THE COURT:** Just to clarify, I could have asked you
3 this, Ms. Richman, this was prepared by NSA, not your client,
4 right? Is that your point?

5 **MS. RICHMAN:** Yes, Your Honor.

6 **THE COURT:** Okay.

7 **MR. GRAY:** The first thing is I've just stated was
8 that this was something that was searched for pursuant to the
9 very, very broad scope of the Court's Order that was entered on
10 November 16, 2022. It was part of -- the defense never
11 specifically said, we want all the stoplight reports. That
12 might have been helpful. Probably would have been helpful if
13 they had done it. But at any rate, this was part of what was
14 searched for. This is the only one that was found. Is that
15 surprising? Not especially. Because for one thing, this gets
16 into the significance of it, but you can see there is pretty
17 limited significance to it. For one thing, it's an NSA
18 document. So this wasn't prepared by the Defendant. None of
19 her supposed work product time went into the creation of this
20 document. This doesn't count against anything that she billed.
21 It's questionable whether she even saw it. It seems to have
22 been an internal document.

23 If you look down here, it says -- that's going to be
24 Donald Pugh who is essentially the administrative COR for the
25 Ironbridge contract and you heard him testify at trial. And

1 this is a communication from him to Kristin Mair who at that
2 time, I think, may have been the contracting officer, probably
3 was the contracting officer on the Ironbridge contract, and to
4 someone else named Daniel, and the rest of it it's been
5 redacted. And of course the fact that it's redacted as well as
6 the fact that we have a production number on the bottom of it
7 reflects that it was produced in advance of trial.

8 Now, the only thing --

9 **THE COURT:** Does 29232 mean this is document number
10 29,232? What does that number mean?

11 **MR. GRAY:** That's the number of pages in the order of
12 which from 1 to whatever we ultimately finish with, that is
13 thousands of pages.

14 **THE COURT:** So that's what I wanted to establish in
15 the record. That number is not just some random number. They
16 were meant to, basically, keep track of the number of pages the
17 Government was producing.

18 **MR. GRAY:** Exactly. So that if necessary at trial it
19 could be referred to by its production number or the defense
20 raised a question about it.

21 **THE COURT:** But not a random number? This is --
22 before this one there were 29,231 other pages?

23 **MR. GRAY:** That's right, Your Honor. It's a
24 sequential production number document. That's what that is.

25 **THE COURT:** The one thing you said so far that I don't

1 think resonates with me is they could have asked for more. I
2 mean, Mr. Ahlers asked for everything so I don't think it's
3 right to say, well, they should have asked for more stoplight
4 reports. They asked for documents that this were encompassed
5 by. This document -- let me restate it.

6 This Defense Exhibit 6 was certainly within the broad
7 scope of what was requested. So if there's no more, that's
8 fine. But if -- the answer can't be, well, he didn't ask
9 specifically enough for this so therefore we didn't produce
10 more. That would be upsetting.

11 **MR. GRAY:** That was not my answer, Your Honor.

12 **THE COURT:** Well, I thought it was possibly your
13 answer.

14 **MR. GRAY:** As I started out saying, the request from
15 the defense -- that's true of prior counsel, it's true of the
16 new counsel -- have, in general, been nebulous, vague,
17 sweeping, anything related to loss. Anything that would be
18 exculpatory with regard to loss. And all I was saying is,
19 jeez, it would have been nice, for example, if Mr. Ahlers,
20 based on his consultations with his client who should know the
21 relevant paper documents at the NSA with regard to this
22 contract pretty well, that, yes, we'd like anything related to
23 the ongoing progress on the contract and that would include
24 things like stoplight documents, et cetera, et cetera.

25 **THE COURT:** Well, there are a lot of things I might

1 agree with you about, Mr. Gray, but one thing I don't agree
2 with you about is some things were broad and a little vague,
3 more than some ways now that's continuing.

4 But when I look at this Order, which these categories
5 didn't come from me, I don't call this vague. I mean, I
6 thought that they were incredibly detailed, and I thought it
7 was a little burdensome and he had his reasons. But, you know,
8 if you ask for a quality assurance surveillance plan, if you
9 ask for annual performance evaluations for project management
10 plans, or résumés, or tradeoff study analysis -- and I can keep
11 going -- status reports or a slide deck. I didn't think this
12 was vague. I thought it was just the opposite.

13 **MR. GRAY:** Your Honor, I was not speaking universally.
14 I was saying with regard to particular things and that remains
15 true. If you had been told by your client that there is
16 such-and-such a document that will exculpate you and show that
17 you were doing work, by all means within the context of your
18 broader request say, like, for example such-and-such. All I
19 said was that would be helpful. It would have been reduced the
20 enormous burden on the NSA that they faced as a result of this.

21 When Ms. Weeks ultimately sent something to me that
22 referenced stoplight documents for example, I was able to get
23 back in touch with her and say, what exactly are you looking
24 for with regard to this? She sent me this. I then got back to
25 the NSA, they said, yep, that's one of the things we produced

1 and that's the only one we found.

2 **MS. RICHMAN:** Objection. I just want to clarify, Your
3 Honor, that that has never been communicated to us before
4 today, to be clear, and us bringing that here today before you,
5 that would have changed our decision to raise it today. I
6 think it's important for me to note that. Thank you.

7 **MR. GRAY:** I have no idea what she's objecting to.

8 **THE COURT:** She's saying you never told them. This
9 was searched and the only one they ever found was this one.

10 **MR. GRAY:** This all happened within, like, the last
11 week or so or 10 days. I think the original communication I
12 got from Ms. Weeks about referred to stoplight reports was
13 around December 5th. Let's see, at that time I would have been
14 working on the response to the Rule 29 motion. There was then
15 the additional filing that I had to file to get the extra days
16 on the Rule 29 motion. Looming also, and with deadlines that
17 we had within the last couple of weeks, we need to file a
18 revised sentencing memo in this case, need to confer with the
19 defense, which they were pressing me about, with regard to the
20 reaching agreement on the disputed findings of fact in the PSR.
21 So this is something that's happened within, like, the last --
22 certainly the last two weeks that they have raised this, shown
23 it to us, I followed up with the NSA and learned that there are
24 no others.

25 But, I mean, this thing -- this motion that we're here on

1 today, they filed this out of the blue, as Your Honor notes, on
2 a Saturday. I was not expecting that we were going to be
3 having another conference on discovery in the month of December
4 with all of the other briefing I had to do on this case this
5 month.

6 **MS. RICHMAN:** Objection, Your Honor. I need to
7 clarify the record that misstates facts in evidence. Our
8 filing was in response to assertions made about the scope and
9 nature of our discovery requests in Mr. Gray's filing. It was
10 a responsive filing, and it is styled as such. So I wanted to
11 make sure the record is clear on that.

12 **MR. GRAY:** Yes, I'll make sure the record is clear on
13 that. My reference to the discovery demands of the defense in
14 that letter was barely one paragraph long, and it addressed the
15 fact that that was the answer to Ms. Richman's claim that I had
16 plenty of time to get the response to the Rule 29 motion done
17 because, in fact, and I could have produced far more emails
18 about it than I did, I have spent an enormous amount of time in
19 September, October, and November trying to deal with these
20 discovery demands from the defense. It's been, like, the fall
21 of 2022 all over again except this time it's on me and not on
22 Mr. Cooch because Mr. Cooch is no longer available.

23 Anyway, let's see if we can get back to kind of addressing
24 some of these things in order. As I've indicated, the bottom
25 line on this was a) it was produced, b) it was not used, c) the

1 NSA says we don't have any more of these.

2 As I was about to say that's not especially surprising
3 because as we heard in the testimony from Jonathan Smith, and
4 this is included in I think the text of my response to the Rule
5 29 motion, he was not a big one on reports. He felt like he
6 was there every day. He was seeing these people every day. He
7 knew what was going on. He acknowledged that, yes, it says in
8 the contract documents that there are supposed to be these
9 regular reports, but I didn't need them, I didn't care about
10 them.

11 There's a little bit of a dispute as to whether at some
12 point someone formally said you don't have to do these. But
13 the bottom line is we know that they stopped doing them.

14 And this is -- it's shown, for example, by -- this was all
15 introduced at trial. This was significant evidence that was
16 discussed certainly in both opening and closing arguments by
17 the defense.

18 Here it is. So this is Government's Exhibit 24E1 at
19 trial. And there's also, I believe, a previous email from
20 Ms. Heinze in regard to this and I'm having trouble putting my
21 hands on right at this moment.

22 But as you can see, this came out on April 4th, 2017, at
23 7:57 and --

24 **THE COURT:** Is this an exhibit?

25 **MR. GRAY:** Yeah, this is an exhibit. This is

1 Government's Exhibit 24E1 at trial.

2 **THE COURT:** Oh, wait a minute. Let me write that
3 down. Government's Exhibit what?

4 **MR. GRAY:** 24E1 at trial.

5 **THE COURT:** Okay.

6 **MR. GRAY:** As I say, there is also that was introduced
7 at trial, I'm just not laying my hands on it right now, that --
8 there was a request that was received, I think, originally in
9 late March from Erica Heinze at the NSA asking for a report --
10 a status report, progress report, program update covering the
11 last six months of the contract. So clearly those hadn't been
12 done for at least a six-month period from that would be October
13 of 2016 through March of 2017. No program reports were being
14 asked for throughout that period which is a third of the time
15 that she was program manager.

16 **MS. RICHMAN:** Objection, Your Honor. Again, this is
17 misstating facts in evidence. The stoplight chart is a
18 completely different type of report than the status report
19 referred to in this email. I'm happy to clarify my response,
20 but I want to make plain that this was attached, there was a
21 different kind of status report attached to this. It's
22 different from the stoplight chart.

23 **THE COURT:** Right, but Mr. Gray represented they have
24 found no other stoplight chart.

25 **MS. RICHMAN:** Thank you, Your Honor. But what I'm

1 trying to make clear --

2 **THE COURT:** I understand they're not -- there's a lot
3 of reports.

4 **MS. RICHMAN:** Yes, there are many kinds of status
5 reports. I'm happy to clarify that more in my response and
6 point to trial testimony that we think is of note with respect
7 to that.

8 **MR. GRAY:** We were done with the stoplight reports,
9 Your Honor, as far as I was concerned. This is a new topic.
10 It's a related topic in terms of demonstrating why status
11 reports weren't being requested, that's how it's related. But
12 that's what I'm in the process of trying to develop now so I'd
13 like to get back to that.

14 As you see here, so as I was indicating before the
15 objection came, the original request from Ms. Heinze was, like,
16 I want to say a week or 10 days before this. The Defendant
17 didn't respond to it, just basically ignored it. And on this
18 other email that I'm looking for, I may have to send it to the
19 court and opposing counsel afterwards that I'm sure was
20 likewise introduced at trial, Ms. Heinze followed up a week or
21 10 days later and said, I still need this, please do it.

22 And so here you see, I think the original -- the previous
23 email from Ms. Heinze was a little before this. You see this
24 one is at 7:57 a.m. on the morning of Tuesday, April 4th, 2017.
25 So when she gets -- when the Defendant gets her request from a

1 person, who is perhaps the contracting officer specialist at
2 the time on the contract, for a status report, what does she
3 do? She communicates that, she transmits it, delegates it to
4 Jason Doyle, the technical lead on the Ironbridge contract.
5 Doesn't even try to do it up herself.

6 As you can see here, she's not looking for much. What she
7 says is, friendly reminder, I need you to mockup some quick
8 points over the past six months on the program and then send
9 them to me. So she didn't even feel that she was capable of,
10 like, mocking up a handful of basic points about what had been
11 going on over a period of half a year.

12 **THE COURT:** So here's my comment about this, this was
13 a big piece of evidence in the trial, if memory serves me
14 correctly. But the question here isn't about that, the
15 question is what documents are out there? This would show me,
16 I think, that if somebody was asking for status reports for the
17 six months prior to April 2017 there wouldn't be any, and this
18 would support your claim because this is what it says, we
19 hadn't done any. So that covers that period. But, I mean,
20 we're not here to try the case again.

21 So I'm only interested in what documents are out there
22 that are relevant to the loss issue, for example, or the
23 obstruction issue that might be in your possession or NSA's
24 possession that haven't been turned over?

25 **MR. GRAY:** The defense has been asking just broadly

1 for status reports at times. I think they've indicated that
2 they think there should be monthly status reports. I'm not
3 sure to what extent they're conscious of this exhibit before
4 today. They haven't referenced it in much of -- I'm not sure
5 they've referenced it in any of their filings. Their
6 persistent, continued demands for this material seem to reflect
7 they haven't taken into account the fact that we have an
8 express statement from the Defendant herself that no status
9 reports have been done, apparently at least over a period of
10 six months. What she says beyond that is that Jon, that would
11 be Jonathan Smith, had us stop doing these and now the
12 contracting officer specialist, that would be Ms. Heinze, is
13 demanding them.

14 And then we see what her reaction to having this
15 obligation imposed on her, at a time when she's billing eight
16 hours to program management on the Ironbridge contract
17 virtually every day, is "Ugh." Then she delegates it to
18 Mr. Doyle to take care of it.

19 Let's look at how long it takes him to actually generate a
20 status report on this contract when one is requested. This is
21 at 7:57 a.m., April 4th that request goes to him. This is
22 Government's trial Exhibit 24E2. He seems to respond within,
23 it appears, virtually a matter of minutes. "Let me know if
24 this is what you're looking for." He then asks, "Is this
25 something that should be done weekly, monthly?" This is like a

1 whole new thing that is happening here because Mr. Smith, as he
2 indicated and testified to at trial, did not feel the need to
3 receive status reports on a regular basis. So then the
4 Defendant responds "monthly."

5 Then if you look at the exhibit itself for the -- I should
6 say the report itself, this is what you have, you know, as she
7 asked him. It's a bunch of bullet points. Not terribly --

8 **THE COURT:** Can you hang on, Counsel, one second.
9 Sorry. Give me one second. I have to take care of one matter
10 that came up. So I'm going to need to take a brief recess.

11 **THE CLERK:** All rise.

12 **(There was a break at 11:56 a.m. to 11:58 a.m.)**

13 **THE COURT:** Sorry about that. You were saying?

14 **MR. GRAY:** Right, so we see that within a matter of
15 minutes Mr. Doyle, the technical lead on the contract, the
16 person who is actually at the NSOC work site every day of the
17 week pretty much, is able to respond to it within a matter of
18 minutes.

19 **THE COURT:** Can I ask you this, Mr. Gray, I'm not
20 following you here. I understand the evidence from the trial,
21 but that's not what they're asking for. They think, okay, you
22 establish this, you establish on this report, and to the extent
23 this bears on other aspects of her work that was the
24 Government's theory that she didn't do the work, she billed for
25 work she didn't do. This was proof of that.

1 But they want to try to show she did more than the
2 15 percent you're giving her credit for. So that's a different
3 issue. So I don't really need to review the evidence on -- I'm
4 just trying to focus us in. We don't have unlimited time. Why
5 do I need to hear that she delegated this task to Mr. Doyle,
6 she hadn't had reports for six months. Let's focus on what
7 they're saying. They're challenging the 15 percent you're
8 giving her credit for. They want to show it was more because
9 loss is a factor in the guideline calculation. The amount of
10 the loss affects the number of upward levels that might be
11 assigned, and they want to prove she did more than you gave her
12 credit for. So how does this bear on that?

13 **MR. GRAY:** Your Honor, it bears on that very, very
14 directly. Because it's shows when she was asked to produce a
15 status report, which should have been one of her core functions
16 as the program manager, one of the fundamental things that she
17 was to do, she didn't have the knowledge to do it, she wouldn't
18 do it, she sent it off to somebody else, and even when he did
19 it it didn't take very long. That definitely goes to the whole
20 question of the amount of the loss and how much work was she
21 doing. This indicated that she hadn't been asked to do program
22 status reports for a period of six months.

23 So, clearly, none of the time that she billed for between
24 October and March of 2016 to 2017, could be attributed to doing
25 status reports because we know they weren't done. And on top

1 of that, when one finally was asked for, could she do it? No,
2 she lacked the knowledge. So she had Mr. Doyle do it. That
3 goes directly to not only the question, which is where I
4 started from, of are there undiscovered other status reports
5 out there, I was trying to explain to you, a) the NSA has said
6 the answer to that is we have produced what we have found,
7 and b) --

8 **THE COURT:** I think that's all they wanted to know,
9 did you produce everything that would be responsive to these
10 requests?

11 **MR. GRAY:** Subject to the caveat that the plug was
12 pulled by the defense in January of 20223 --

13 **THE COURT:** So therein lies the rub. They're saying
14 that's fine for trial. We're past trial. Sentencing is a new
15 matter. They're still entitled to it for sentencing. So the
16 answer that there might be more, we stopped looking because
17 Mr. Ahlers and the Defendant wanted to go to trial is not an
18 answer. That's their argument. They're saying this is a
19 different phase, *Brady* continues. The fact that the search was
20 terminated in order to proceed to trial is a different chapter.

21 **MR. GRAY:** All right, Your Honor. If I can just
22 have --

23 **THE COURT:** So they're saying, basically, the search
24 needs to resume.

25 **MR. GRAY:** And I am saying the search does not need to

1 resume. I am saying that we've did a lot of these searches
2 back in the fall. In all, we have now produced 32,000 pages of
3 documents of discovery.

4 Please let me get into what happened in January, sort of
5 at the end of my argument. I am prepared to address that, I'd
6 like to address that. I'm glad to assist the Court with that,
7 but at this time let me see if I can just sort of go back and
8 begin at the beginning and cover the points that I believe I
9 feel that I need to cover. And I'm certainly glad to get to
10 questions that are helpful for the Court along the way.

11 First, let's start first with the basic issue of
12 discovery, who said what, who's promised what. This goes back
13 to the issue of vagueness and nebulousness that I started
14 talking about at the very beginning of my argument here this
15 afternoon. That I get these requests for, can you tell us that
16 there is no other exculpatory evidence out there. That is not
17 a *Brady* request. That is some --

18 **MS. RICHMAN:** Your Honor --

19 **MR. GRAY:** I'm sorry, may I occasionally --

20 **THE COURT:** Wait, wait, wait. There was a fair amount
21 of this on both sides so and you were annoyed, Ms. Richman, I
22 could tell, when Mr. Gray interrupted. He's annoyed when
23 you're interrupting. We'll all be equally annoyed. Let me
24 hear a sentence and then I'll let you object.

25 **MS. RICHMAN:** Okay.

1 **THE COURT:** Finish your sentence and then if she wants
2 to object that's her right.

3 **MR. GRAY:** Right. That's what we were consistently
4 getting was these very --

5 **MS. RICHMAN:** Objection, Your Honor, vague. I'd like
6 to know which January document he is referring to and does he
7 have a specific exhibit with a statement he is referencing?

8 **THE COURT:** Are we talking --

9 **MS. RICHMAN:** I don't even know when we're talking and
10 what time he's talking about.

11 **THE COURT:** Could you just clarify then?

12 **MR. GRAY:** Your Honor, we're referring to January of
13 2023.

14 **THE COURT:** Okay.

15 **MR. GRAY:** It's one of the reasons why it took me
16 longer than I would have liked it to to get the filing done
17 yesterday because I was going back through the transcripts from
18 January of 2023 to try to see exactly when the issue was nailed
19 down that the defense was no longer asking to have additional
20 documents produced. So for the moment, I'm now going to go off
21 and address that issue. That was something else I had planned
22 to address but I'll do it now as a result of this objection
23 from Ms. Richman.

24 Hang on just a moment because I've actually got --

25 **MS. RICHMAN:** Your Honor, I'd also like to object to

1 the relevance of this discussion because we've made clear that
2 we've renewed our discovery request in the context of
3 sentencing. If the Government is seeking a ruling that it has
4 no obligation to perform any searches in response to our August
5 request, as a result of what happened in January, that's fine.
6 But, you know, otherwise I have a difficulty understanding the
7 relevance of what happened in January. If that is the
8 Government's position, then I think that's teed up for ruling
9 by the Court. We don't dispute that Ms. McComber chose not to
10 go-- that Ms. McComber's counsel chose not to receive
11 discovery --

12 **THE COURT:** Ms. McComber and her counsel.

13 **MS. RICHMAN:** I wasn't there at the time, Your Honor.
14 I cannot speak. I can speak only to what I've read on paper.

15 **THE COURT:** Well, it was my understanding that he was
16 deferring to what she wanted or she listened to his advice. I
17 don't know what. But the bottom line is it was always my
18 understanding that the defense wanted to go to trial.

19 **MS. RICHMAN:** Yes, Your Honor. And I'm just wondering
20 if that is of relevance to our request for discovery in the
21 context of sentencing.

22 **THE COURT:** I don't know where we were in the
23 discovery process, but I thought it was drawing to a close at
24 that point. It wasn't quite done.

25 **MR. GRAY:** Yes, Your Honor. If I, please, could have

1 just a couple of moments to actually speak without being
2 interrupted.

3 There was a teleconference. It was held on January 4th,
4 2023. I don't have the ECF No. on that right with me because I
5 just printed it off from my older transcripts. I think it was
6 in the nature of, like, discussing motions that were being teed
7 up, I think for a hearing on January the 10th. And that was
8 where there was, as part of that, a discussion about how much
9 longer it was going to take to produce all this material. That
10 conference may well have been triggered by our advising the
11 Court, hey, we see that we have this January 23rd trial date
12 coming up, the people at the NSA have been working very hard
13 through the holiday season trying to comply with this, of
14 course a lot of people were off, we're not going to quite be
15 there by January the 23rd.

16 Let's see. And, actually -- right, so if you look at
17 Page 62 of -- I think there's something before that. Pages 42
18 and 43 you talk about how persistent Mr. Ahlers had been --

19 **THE COURT:** Pages 42 and 43 of what? I'm sorry.

20 **MR. GRAY:** The January the 3rd teleconference.

21 **THE COURT:** I don't have that. It was January 3rd
22 you're saying?

23 **MR. GRAY:** Sure. We'll get you the relevant, at least
24 from our perspective, the relevant --

25 **THE COURT:** But I thought it was the 4th you had said?

1 **MR. GRAY:** You are right. Yes. It is January the 4th
2 of 2023.

3 So we had been discussing these discovery matters that the
4 defense was asserting and the progress of the NSA's efforts to
5 comply with the Court's order and then Mr. Ahlers had been
6 speaking and then he just abruptly said, Page 47, line 14 to
7 15.

8 Mr. Ahlers: Well, the defense is ready for trial, Your
9 Honor.

10 You said: Well, are you?

11 He said: Yes, I mean --

12 Then you talked about that. You said, you thought there's
13 a lot of outstanding issues that are still bouncing around
14 here, they're going to need to be resolved.

15 As I -- let me see -- right. So I think the way things
16 were left at the end of January the 4th was that he had -- he
17 was still indicating that they were eager to go to trial. And
18 so you said, well, let's not take this too quickly. Why don't
19 you take some time to talk to your client and get back to me
20 and report to me in chambers as to whether you really want to
21 go to trial on the 23rd.

22 You had previously laid out at page -- I'm sorry, this is
23 from Mr. Ahlers. I think it was at Pages 24 to 25 that he said
24 for the first time: We're prepared for trial and would like to
25 go forward on January the 23rd. He then repeated that again

1 later in the hearing on the 24th. You then gave him the
2 opportunity to consult privately with his client following the
3 hearing and call chambers.

4 **THE COURT:** Was Ms. McComber on that call? She
5 typically was. I don't know if she was on that --

6 **MR. GRAY:** It doesn't indicate on the cover page that
7 she was. That may have been why Your Honor felt that she
8 should give him time to consult with his client about this and
9 make sure she was comfortable with it.

10 So we were back in court for a pretrial conference/motion
11 hearing on Tuesday, January 10th, 2023, and Mr. Cooch did an
12 extensive report at that time, oral report, he indicated that
13 his previous written report had been on December the 23rd.
14 That at that time, after a lot had already been produced, about
15 2,000 pages of documents were still in the queue to be
16 redacted. And he then indicated that he thought about half of
17 those would be coming out pretty soon.

18 So he said -- actually, he said, yes, as of yesterday,
19 that would be January the 9th, the NSA produced to the
20 Government 1,000 pages -- approximately 1,000 of the 2,000
21 pages.

22 So my -- what I suspect here, and either Mr. Pine or
23 perhaps one of the people in the NSA-IG's office could answer
24 it, is that basically all of the searching had been completed.
25 And that what remained was simply the classification review

1 process and the redaction process --

2 **THE COURT:** I didn't think that, but that doesn't
3 mean -- I thought the searching was still going on.

4 **MR. GRAY:** From what I'm seeing here and at this
5 point, this is close to a year ago, and I'll check with
6 Mr. Cooch, who of course cannot be here, and, you know, even
7 the NSA-IG agent that participated in a lot of the searching
8 has since been assigned somewhere else at the NSA.

9 But what he was indicating there was that we had another
10 thousand pages that were still to come. And the sense -- I
11 believe I recall from his comments, and all of us I'm sure will
12 review the transcript in detail following the hearing, is that
13 that would have completed the process.

14 **THE COURT:** That would what, complete the process?

15 **MR. GRAY:** The production of that remaining 1,000
16 pages would have completed the process.

17 **THE COURT:** That seems to me, if that were the case,
18 we would have just gotten that done, right?

19 **MR. GRAY:** Your Honor, I think that was -- Your Honor,
20 and I have gone back and forth on this a number of times. As I
21 told you, I was very reluctant to give up the January trial
22 date because I sacrificed personally to make it possible. But
23 I think it seemed to me that if we were only talking about
24 another four to six weeks that might make sense. So, indeed,
25 at the end of the hearing on the 3rd there was, as I recall, or

1 maybe the 10th, there was extensive discussion if we're not
2 going to do this on the 23rd, when could we do it.

3 But I believe that it was then in the further hearing on
4 the -- let me see what's going on at the end of that.

5 **MS. RICHMAN:** Your Honor, I'm sorry, I really don't
6 want to interrupt Mr. Gray again, I just wanted to direct the
7 Court's attention to an ECF-filing at January 11th, 2023, that
8 may clarify some of the questions that are being asked.

9 **THE COURT:** What's the ECF number?

10 **MS. RICHMAN:** 238, Your Honor. I don't have a copy, I
11 just have my notes of the discussion, but there was an explicit
12 identification of the number of custodians for whom they were
13 still waiting. And it said: The NSA is still waiting for the
14 capabilities team to retrieve some archived data for five other
15 custodians and also still awaiting responses from two more of
16 the group of six custodians who agree to search their own email
17 records. We have also received records from one other
18 custodian that an NSA-OIG agent will be reviewing.

19 I don't want to read the whole thing verbatim, and I'll
20 sit down so Mr. Gray can continue. But I just want to clarify
21 in the response to the Court's question that that ECF does have
22 a description of what searches remained outstanding.

23 **MR. GRAY:** Okay. Fine. That's a useful and helpful
24 clarification. So, apparently, there was still some searching
25 that was going on.

1 **THE COURT:** That was definitely my understanding and
2 this supports that.

3 **MR. GRAY:** There was another thousand pages of
4 documents that were relatively close to being ready for
5 production. And I know we did another production a week later
6 on the 18th. That was our final production. So even, I mean,
7 what Your Honor had proposed saying to Mr. Ahlers was, if you
8 want to go to trial, understand that it's just going to be we
9 stop dead here on the production at this time. And we,
10 nevertheless, since we were able to get a bunch more documents
11 ready by the 18th we went ahead and produced those.

12 So let me try and get back to what I'd like to do is sort
13 of address sequentially if I could the points that Ms. Richman
14 raised.

15 She began by talking about the issues about our discovery
16 discussions between her and us. My take on those is that
17 Ms. Richman has consistently pressed me to make bald statements
18 to the fact that there is no other exculpatory material out
19 there at the NSA that would be of assistance to the defense.
20 And I am not willing to make a representation that is that bald
21 and sweeping.

22 At times, in emails recently, I've said to Ms. Richman
23 this is not anything that *Brady* contemplates and requires.
24 *Brady* says that the Government cannot suppress material
25 favorable evidence that is known to us. If you want me to say,

1 as I stand here today, I know of no material favorable
2 evidence, specifically, that would be exculpatory for the
3 Defendant, I'm glad to say that because I don't know of any.

4 Now, on the other hand, and this is part of the program
5 here, one of the reasons why I was reluctant to say that to
6 Ms. Richman back in August was I never reviewed all of her high
7 side emails myself. That was undertaken by AUSA Joyce
8 MacDonald and by former NSA-OIG agent, Lori Hazenstab.

9 So what I knew from them and what I could have said to
10 Ms. Richman at the time, and can certainly put on the record
11 today, is that both of them indicated that they did not think
12 there was anything of significant exculpatory value indicating
13 that Ms. McComber had done a significant amount of work onsite
14 or that there was major work product that could be identified
15 from the review of those emails.

16 I went out to the NSA because I had not had the chance to
17 do it, and we were trying to get the arrangements in order for
18 Ms. Darrow to go out there and do it. I went out there on
19 November the 30th and began going through the emails myself.
20 And one of the most -- there's a couple of things that were
21 very useful here in terms of going through the emails.

22 I mean, Ms. Richman has said that Ms. Darrow had various
23 complaints about her ability to rapidly search through them.
24 But as was noted, we had made arrangements for her to come out
25 for a full day on Friday the 15th.

1 **THE COURT:** Friday the 15th of?

2 **MR. GRAY:** December. We made arrangements for her to
3 come out for a half day on December 22nd. Mr. Pine had said,
4 I'm supposed to be off that following week, but if she needs
5 more time than the first day and a half I will make myself
6 available to accommodate her. She left after four hours. She
7 didn't even stay the full first day. She left after half a
8 day.

9 When I was out there, I stayed for longer than a half a
10 day. And two of the main things that I used to get -- as has
11 been indicated -- because she can't get on an NSA terminal even
12 if she has a security clearance, it had to be transferred to a
13 laptop so she could look at it. And Ms. Richman has indicated
14 that she thought it was too hard for her to rapidly search
15 through it without being able to use key words.

16 But there were two other things that were available that
17 were extremely helpful. One of them was that Agent Hazenstab
18 had also made a spreadsheet showing -- using the Access Control
19 records, it's basically a variant of the investigative
20 spreadsheet we introduced at trial, for each day over the
21 course of the indictment period. And of course that reflected
22 whether or not Ms. McComber was in Access control on those
23 days. And that if she had sent either an email or the instant
24 message type messages that have been referred to as Lync
25 messages, there was a column that set forth the number of

1 those. So you could look at that spreadsheet and determine
2 that you needed to go to a particular date if you wanted to see
3 the one email and seven Lync communications that Ms. McComber
4 herself sent to other people on that day. That was a lot of
5 what I was using.

6 Then there was a second very significant, very helpful
7 document with regard to the email issue, Your Honor. And I
8 should be able to -- I believe it's back or very close to being
9 back from redaction so I should be able to get that to the
10 Court and opposing counsel very quickly, very promptly -- was
11 that when Ms. McComber went out there, and she stayed out there
12 for two days, December the 7th and December the 9th of 2022,
13 looking through these emails on a laptop just like
14 Ms. MacDonald had done earlier, just like I subsequently did,
15 and like Ms. Darrow ultimately did, and she listed out the
16 emails that she wanted to produce to aid her defense. That
17 total came to 1,315 emails. But she gave us a list and it has
18 columns indicating whether she was the sender of the email, I
19 believe.

20 **THE COURT:** Were they produced?

21 **MR. GRAY:** Your Honor, let me -- I'm coming to that,
22 I'm coming to that. Whether I think someone else -- whether
23 she was, like, a direct recipient of somebody else's email or
24 whether a couple of people were on it and whatever other emails
25 she wanted. So when we saw -- when the NSA saw -- that on

1 December the 9th, this list of 1,315 emails she said she
2 wanted, they said -- and that was when things began germinating
3 about whether or not we could make the trial date of
4 January the 23rd work -- this will take Lord only knows how
5 long to do to review 1,300 emails.

6 And the further thing was they could tell by the list
7 Ms. McComber had provided in her own handwriting that many of
8 these emails would be completely valueless to her defense at
9 trial because many of them were emails that were sent out to
10 everybody in the NSA. Others were emails that were sent out to
11 everybody in the NSOC. And there was only very limited number,
12 much more limited number that were more directly associated
13 with Ms. McComber herself.

14 I was told I think the other day, in response to a
15 question I raised as part of preparing for this hearing, how
16 many of the emails on Ms. McComber's list were directly sent by
17 Ms. McComber to someone else? And the answer I think came back
18 was like 172. And I'd ask, okay, so how many emails on her
19 list were sent to Ms. McComber herself? Like, a limited number
20 of other people and people who are familiar names because they
21 worked on the contract, the answer to that was 299. So, in
22 all, there were less than 500 emails that were either directly
23 sent to her or that were sent to her and a few others that she
24 requested. But she had requested more than 800 additional
25 emails beyond that.

1 And Your Honor also has to bear in mind that we, as a part
2 of the search that went on using key words that were agreed
3 upon between us and the defense, my understanding is they
4 applied those key words across the universe of her emails, and
5 that we then produced whatever turned up in response to that by
6 way of the key words.

7 And there were three separate exhibits that were
8 introduced at trial that included high side emails from the
9 Defendant, which I think were 24I, 24J and 24L. And I believe
10 that 24L was the collection of, at least the ones that we
11 selected, of the emails that had been searched for in, like,
12 the September, October, November of 2022 time frame.

13 So, in fact, there were substantial high side emails that
14 were actually introduced into evidence at trial here. Lync
15 conversations, same thing. I mean, I recall one, for example,
16 where Ms. McComber spent roughly an hour exchanging instant
17 messages with someone that she was dating at the time who also
18 worked at NSA that we introduced at trial.

19 So, no, we didn't produce the 1,315 emails that she
20 requested because as soon as we got that list the NSA said to
21 us this can't be done by January 23rd. And, moreover, you just
22 looked at it and you realized the heavy majority of these are
23 going to be valueless and even many of the ones that she sent
24 were not of great significance.

25 I can tell you in the course of the roughly full day that

1 I spent out there, when I went out there on November 30th,
2 initially I went through them pretty much email by email, at
3 least if it looked like it might be anything that was sort of
4 directly connected to her. I went through four months -- three
5 and a half months, starting from mid March through the end of
6 June.

7 **THE COURT:** Mid-March of what year?

8 **MR. GRAY:** 2016 through the end of June. And in that
9 entire period, I saw one exchange of emails between
10 Ms. McComber and Jason Doyle that I consider to be really
11 substantive. And it was about I think finding new people who
12 were needed for some particular role on the contract and that
13 was an exchange of emails. There were a number of them, but it
14 was probably all within a single day. And actually I believe
15 that that set of emails was referenced in the version of our
16 investigative spreadsheet that was introduced as an exhibit at
17 the trial. That at this point she had email discussions with
18 Mr. Doyle, the technical lead, about these things.

19 **THE COURT:** Did she get the ones that you've described
20 from your perspective as being at least more specific to her?
21 Did she get those?

22 **MR. GRAY:** No, because the defense had been saying
23 that these are the -- these are the 1,300 she wants, and we
24 had -- we had tried to get Mr. Ahlers out there with her
25 because we hoped that perhaps, you know, he would be applying a

1 restraining influence and might be, like, really saying let's
2 try to keep this to stuff that's actually of some value so we
3 can get it in time because by that time everybody knew how long
4 it would take the NSA to produce it because of their
5 classification review and redaction processes. But he didn't
6 come. So she's the one who came. She did that --

7 **THE COURT:** So she didn't get the 172 that she sent
8 and the 299 that were sent to her or to her and a few others?

9 **MR. GRAY:** She may well have gotten those as part of
10 the other production that came from the use of the keyword
11 searches that resulted in Government's Exhibit 24L at trial.
12 They may well have been included in that other production.

13 But we didn't -- the way it was left at the time from the
14 defense's perspective this was all or nothing. They wanted
15 1,315 emails, you know, and I suspect that we had at least some
16 kind of conversation with Mr. Ahlers saying, look, this is not
17 workable. Can you boil this down to something that's a little
18 more direct? But she was there. She spent two days going
19 through these emails. She could have noted down 100, 200
20 emails that, you know, some reasonable number that she thought
21 showed significant things about what she did inside Access
22 control at the NSA and that's not what she did. She created
23 something that was unworkable and, you know, helped to cause
24 the inability to finish that production.

25 I will tell you that in addition to the four months that I

1 went through pretty much email by email, and there's no real
2 secret about this, I mean, as the investigative spreadsheet
3 chart reflects, for the first couple of month she does seem to
4 try to go out there fairly regularly, but that ended pretty
5 quickly. It was certainly over by the end of September of
6 2016.

7 And this is another Government exhibit that was introduced
8 at trial. At some point in late September 2016, someone at the
9 NSA sent her a message asking for some information that they
10 needed a response to. I want to say it was, like,
11 September 22nd, September 26, something like that. She didn't
12 respond to it for at least eight days. It may have been more
13 like 14. When she did respond to it, she said, "Oh, I'm sorry,
14 I haven't been on the high side in a while. Here's the answer
15 to your question."

16 And then, of course, by the time you get to -- really,
17 after January of 2016 she's not there very much at all and in
18 the summer -- January 2017, and by the summer of 2017 she was
19 there, like, a couple of days a month in some of those months.
20 And you can't be sending high side emails or doing direct
21 supervision of your team when you're not physically present.

22 So getting back for a moment just to the *Brady* issue.
23 First, I'll even put this directly to Ms. Richman. I've said,
24 if you think of Government attorneys are required to certify
25 that not just that they personally are not aware or other

1 members of the prosecution team are not aware of other
2 exculpatory evidence, but that there is no other exculpatory
3 evidence out there, that's not within *Brady*; and if you believe
4 that is within *Brady*, or if you've got any other formulation of
5 something you would like me to sign. For example, maybe
6 there's a standard form that the Office of the Federal Public
7 Defender, the national office, has, that says something like
8 Government certification that it has complied with *Brady*.
9 Fine. Turn that over to me. I'll take a look at it and if I
10 feel comfortable with it I'll sign it.

11 And I want to make this clear, I want to really emphasize
12 this strongly, especially based on the additional knowledge
13 that I gained when I went out there and spent a day looking
14 through these high side emails on November the 30th, the
15 estimate for the amount of the loss and restitution that we put
16 forth in our filing with the Court on April 28th, which we
17 said -- we explained how we were going to do it. We said that
18 as for her time onsite, that was about 260 hours, we'll give
19 her credit for 200 of that 260 hours. And the things we'll
20 take off were stuff where it was clear that she was in the
21 Silent Roar area of the NSA, or just time that would be
22 consistent with what she would have needed to get from the main
23 entrance of the NSA to the NSOC facility herself where she
24 could actually start doing her work. So that took off about 60
25 hours from that. But the other 200 hours we said we'd give

1 her.

2 I haven't looked through a lot of these emails. I'll tell
3 you, that was a very, very generous allowance to her. If you
4 asked me, Mr. Gray, based on your investigation here, how much
5 of the money that she was -- the, roughly, 388,000 that InfoTek
6 was paid for her services as program manager do you think she
7 actually, honest to God, worked, maybe you might say 30,000,
8 maybe 20,000. Somewhere in that range. Not much more than
9 that.

10 So the position we took in our restitution filing was
11 that -- I'm looking for the specific figures in my notes. We
12 would give her credit -- Ms. Richman at times mentioned a
13 figure of, like, 15 percent. We said we'll give her credit for
14 75 percent of the time that she was in Access Control onsite,
15 even though in retrospect it really looks like that was beyond
16 generous. And with regard to her time offsite, I think as to
17 that we said we would give her credit for 15 percent of her
18 time offsite. I'll tell you, I believe that that is
19 extraordinarily generous, too. There is so little evidence of
20 her doing any significant work really over that period of time,
21 onsite, offsite, whichever. That the figure that we put out
22 there, really, was a gift. And we took that figure because we
23 were trying to bend over backwards to be reasonable and
24 conservative in the hopes that it would simplify the sentencing
25 proceeding here, which sadly, as you can see, it hasn't done.

1 But bear in mind, and Your Honor has pointed this out,
2 that with regard to the high side emails, for example,
3 basically all of the time that she would have spent typing
4 those emails inside Access Control at NSOC is accounted for by
5 the 200 hours that we've agreed to give her. It's as simple as
6 that.

7 And, you know, let me try to get on to some of my other
8 points here. I was trying to sort of further develop the *Brady*
9 point. As I say, I don't believe there is no such thing in
10 federal practice that I'm aware of prosecutors being asked to
11 say we are -- we have searched everywhere, everything, for --

12 **MS. RICHMAN:** Objection, Your Honor. Mr. Gray
13 continually misstates the certification that I have asked for.
14 I'm happy to clarify. But --

15 **MR. GRAY:** Fine. Leave it for your response argument.

16 **MS. RICHMAN:** I'm just looking at the clock, Mr. Gray.

17 **MR. GRAY:** And you are responsible for much of the
18 delay that has occurred since I've been trying to speak at 20
19 of 12:00.

20 **THE COURT:** Well, you did your share of interrupting
21 too --

22 **MR. GRAY:** But with very minor focus --

23 **THE COURT:** Well, that's what Ms. Richman thinks of
24 her interruptions. Everybody thinks they're important. Let's
25 get back to it.

1 **MR. GRAY:** The Government cannot suppress exculpatory
2 evidence known to members of the prosecution team. And the
3 prosecution team is not the entirety of the NSA or people who
4 worked at the NSA from 2011 through late 2017. And I can say
5 we are not suppressing any known exculpatory information that
6 is out there that we are aware of.

7 In addition, I would note we have no obligation under
8 *Brady* to produce information that is known or available to the
9 defense and the Defendant. We haven't withheld anything on
10 that ground, but a lot of the stuff that they're asking about,
11 I mean, you would think if there was some big project that she
12 worked on that she was confident would be reflected in the
13 personal files of various CORs, people like that, that could
14 have been specifically asked for. We have not had requests of
15 that category and that level of specificity.

16 **THE COURT:** But she couldn't keep some of these things
17 herself, right, because they're classified?

18 **MR. GRAY:** Right. But she would know that she worked
19 on them. She could say, okay, in April of 2017, I know I
20 worked on a big project for such-and-such. And there was like
21 only, in that month there was, like, this one project that she
22 said she worked on and she wanted to find out. I think that
23 actually may have been related to the Ironbridge II contract
24 that was coming up. That was really, like, one of the very few
25 specific things she was actually able to say, please look for

1 this because I know I worked on this.

2 **THE COURT:** Well, that was what I thought Paragraph 7
3 of ECF-198 represented, a tradeoff study analysis.

4 **MR. GRAY:** As I say, I'm actually not confident that
5 that even related to the Ironbridge I contract as opposed to
6 the upcoming contract.

7 **THE COURT:** But to your point she knew --

8 **MR. GRAY:** Right.

9 **THE COURT:** -- this would illustrate that she did have
10 something in mind that she couldn't keep but would have been
11 done.

12 **MR. GRAY:** Yeah, that information, of that character,
13 has not been forthcoming from the defense. And I am sure that
14 the defense is contemplating at some point alleging that they
15 believe Mr. Ahlers made all sorts of mistakes and amounted to
16 ineffective assistance of counsel. But let's understand what
17 was his vantage point about proceeding onward to trial.

18 This appears at Pages 141 to 142 of the Tuesday,
19 January 10th, 2023 contract --

20 **THE COURT:** Contract?

21 **MR. GRAY:** I'm sorry, January 10th, 2023 pretrial
22 conference/motion hearing.

23 **THE COURT:** And what page did you say?

24 **MR. GRAY:** In particular, Page 142. So Mr. Ahlers
25 said that from his perspective, going ahead to trial at that

1 time, the Government runs the following risks: They're going
2 to call a number of CORs, or we're going to call a number of
3 CORs, and I'm going to ask them, here's what you're told to do,
4 here's the regulation, here's the handbook, did you follow
5 this? Did you have a COR file? And if one of them says yes,
6 I'm going to take the transcript where the Government says
7 there's no such thing and say, Government, what's going on
8 here? And then I may ask for spoliation.

9 We ultimately called 17 witnesses at trial as part of our
10 case-in-chief, almost all of whom were people who worked on the
11 Ironbridge contract at NSOC either from the ITK side or the
12 Government side. Mr. Ahlers had -- he called another seven or
13 eight witnesses himself. Total number of witness who testified
14 at trial was 25. So Mr. Ahlers had a free and fair opportunity
15 to go through there and to ask every single one of those
16 witnesses, for example, don't you recall doing extensive work
17 with Ms. McComber on the such-and-such a project in
18 such-and-such a month and wouldn't that have generated
19 such-and-such types of documents?

20 I mean, if he asked those questions I don't recall that it
21 turned up anything productive or turned up any mid-trial
22 demands for production of additional material. I don't believe
23 there were any.

24 But that was apparently what he felt, certainly one of the
25 things he thought at the time that he could do. And certainly

1 he had free reign to ask them how much time did she spend
2 working there. As Your Honor may recall, and it's all set out
3 in my response to the Rule 29 pleading, witness after witness
4 after witness we asked, take a look at these hours, did you
5 have any idea that she was billing for hours like this? And
6 critical witnesses like Rob Bryant said, no, I didn't.

7 As a matter of fact, Mr. Bryant testify that a lot of the
8 time when the Defendant was onsite she would come into his
9 office and sit down and talk to him, they just talked about
10 sports. I don't know if he even knew that she was billing for
11 that time.

12 But Tiffany Starr-Smith, who was actually called as a
13 defense witness and who then we cross-examined, this is all in
14 my Rule 29 response, she was asked, how much work could be done
15 on this contract offsite? Her answer was minimal. Because it
16 was technical material.

17 So the idea that the Defendant could have, like, been
18 working back at her office or at home on her laptop and then
19 generated something that she gave to the NSA, well, it couldn't
20 have been based on classified information that she was working
21 from because she couldn't have taken it offsite. Obviously, we
22 prosecute people for doing that in this courthouse. And, two,
23 why did didn't she specifically raise that and say we want this
24 particular thing? It's because it didn't happen.

25 So, let's see here. I think I've covered that. Yeah,

1 hang on a moment. I mean, in general I would say, Your Honor,
2 the defense keeps saying, well, this is now sentencing and
3 there may be things that are exculpatory at sentencing that
4 wouldn't have been exculpatory and at the main trial. There's
5 some things that fall into that category or that may be
6 relevant.

7 For example, since the Guinther letter was never
8 introduced at the trial, that's a wholly separate and fresh
9 issue for sentencing. But in terms of the amount of work she
10 did when she was at the NSA or offsite, that was all totally
11 relevant at trial. It was central to the Government's proof of
12 the charges and the defense's defense against them. So we were
13 not going to be sitting here and saying, oh, I don't think this
14 particular high side email, you know, that just goes to the
15 calculation of the loss. That stuff would have all been
16 completely relevant at trial. So no, we weren't making
17 distinctions like that and holding stuff back because we
18 thought, oh, well, what if she's quitted, we would have never
19 needed to produce it in the first place. That didn't happen.
20 It did not happen. That's not how we approach this case, and I
21 dare say that's not how any federal prosecutor approaching a
22 fraud case approaches it.

23 Let's see. Okay. Covered that. Yes, most of the
24 obstruction of justice issues were not in evidence at trial.
25 Obviously her false testimony to the NSA investigators, that

1 was introduced in evidence so that was put in at trial, and her
2 false testimony from the witnesses right over there in her own
3 defense is going to be another basis for obstruction claim at
4 sentencing. And there's some other things we've learned about
5 over the course of the time since trial that we'll be putting
6 in to that as well.

7 So as a general proposition, I don't have any problem with
8 the idea that *Brady* applies to sentencing as well and that if
9 we had some major evidence that suggested that here's a huge
10 project she did that justified the 150 hours she billed on the
11 InfoTek contract in the month of July 2017, we would be
12 obligated to produce it and we would have done so. I have
13 never seen anything like that.

14 In fact, as I say, what I have seen is stuff that leads me
15 to think that we were far too generous in the posture that we
16 took of saying that 306,000 would be what we would argue for is
17 the amount of the loss.

18 At some point Ms. Richman said she thought our position
19 had changed from the discussions that took place on
20 August 23rd. I was never going to tell her that I am confident
21 that from the roofline of the NSA down to the bottom of its
22 cellar there is no document in there that might perhaps have
23 allowed your client to say, here, look at this, I wrote some
24 handwritten notes here and gave them to someone, so that's 10
25 minutes you can take off of my amount of the loss. I can't say

1 that that vast organization on a contract over seven years that
2 every -- that the prosecution team has looked at every single
3 page. We can't do that and the law doesn't remotely require us
4 to do it.

5 Oh, Defendant's Exhibit 3, there was something about this
6 that I wanted to address. Yeah, I think this was put up by
7 Ms. Richman, and I think she was objecting to my statement in
8 the last paragraph that we're not going to make a blanket
9 commitment to produce any amount of material you might now
10 choose to request. And Ms. Richman seemed to think that that
11 related to, like, all kinds of different documents. It didn't.
12 This email was specifically about the emails. I didn't get the
13 email from Ms. Weeks until the following afternoon,
14 December 6th, about 4:30 in the afternoon, in which she now
15 said -- and this was attached as an exhibit to our filing
16 yesterday -- we now want, basically, everything, once again.
17 That as far as we're concerned, whatever the defense said prior
18 to trial we can sweep that off the board because we now say
19 we're asking for it now for sentencing. So the prior
20 commitment made by the Defendant and its counsel that led to
21 stopping the search effort doesn't matter, irrelevant, of no
22 weight whatsoever.

23 **THE COURT:** Mr. Gray, let me ask you with respect to
24 ECF-238, which is Mr. Cooch's letter of January 11, 2023, that
25 letter indicates that --

1 **MR. GRAY:** Did I get a copy -- I'm sorry, did you guys
2 give me a copy of that one?

3 **MS. RICHMAN:** We didn't have the printed copy. Your
4 Honor, is that the January 11th status report?

5 **THE COURT:** Yes.

6 **MS. RICHMAN:** Forgive us, we didn't have a copy of it,
7 just excerpts, so we identified the ECF during our conversation
8 about it.

9 **THE COURT:** Okay. Well, I'll tell you what he says,
10 he says that -- and you mentioned it, this has been discussed,
11 this isn't new -- the NSA released to the Government about a
12 thousand of the 2,000 pages of documents that had been in the
13 queue for redaction. And they're being prepared for production
14 and they will be released to the defense this evening or
15 tomorrow. In addition, just today, NSA released to our office
16 for production another 973 pages of reviewed and redacted
17 documents. Those records will be produced to the defense as
18 soon as possible.

19 So my question is, were those actually produced to the
20 defense?

21 **MR. GRAY:** Yeah, I believe those further ones would
22 have been part of our very final production on January 18th.
23 That was the day before the jury selection occurred so yes.

24 **THE COURT:** Okay. Then at that point the NSA
25 estimated about 125 pages of documents in the queue for

1 classification, review, and redaction that didn't include
2 information from the capabilities team or two custodians still
3 searching. So what ever happened to those 125 pages?

4 **MR. GRAY:** Your Honor, I can't answer that off the top
5 of my head in particular because that was Mr. Cooch's role was
6 staying on top of those. I can check when I get back.

7 **THE COURT:** Okay.

8 **MR. GRAY:** And I thought our final production was on
9 the 18th. I would have thought that was the 973 pages, the
10 additional 125, I'd have to see in there was a subsequent --

11 **THE COURT:** Well, the 1,000 and the 973 is almost
12 2,000 right there. But then he talks about another 125 pages
13 that were actually already pulled. They just needed to be
14 reviewed. And then he says: This doesn't include the 1,135 of
15 the high side emails the Defendant herself requested. So
16 that's what you were talking about in December 2022, that she
17 had asked for them without her lawyer. And that on
18 December 23rd, this again is 2022, ECF-211, the defense no
19 longer wanted those produced. And Mr. Cooch wanted the
20 Defendant herself to confirm that.

21 **MR. GRAY:** Right.

22 **THE COURT:** But that's what -- I don't know what
23 happened after that.

24 **MR. GRAY:** His letter asking to have her confirm that
25 specifically was December 23rd or was that Mr. Ahlers' letter

1 to us?

2 **THE COURT:** I don't have that one. This is Mr. Cooch
3 saying, Ahlers doesn't want it, but -- and he would like
4 Ms. McComber to produce it to avoid pit falls down the road.

5 **MR. GRAY:** Right. Your Honor, I'm sure that we nailed
6 that down in that December/January time frame as to whether she
7 independently was still insisting that she get these 1,315
8 emails.

9 **THE COURT:** Even so, the defense's argument is that
10 was trial and this is for the purpose of sentencing. A
11 different issue related to --

12 **MR. GRAY:** It's an argument that has very little
13 content with regard to the issue of the amount of the loss
14 because anything that showed that she did work as the program
15 manager for the Ironbridge contract, offsite or onsite, would
16 have been relevant at trial to the question of whether there
17 was a material difference in the amount of the bills from
18 Infotek and the work that she actually did. It would have been
19 totally covered in terms of relevance by, I mean, the same
20 issue applied at trial. There's no distinction as to the
21 amount of loss between what's relevant at trial and what's
22 relevant at sentencing.

23 **THE COURT:** Right. But the problem I'm having with
24 that is how do I know that there isn't something in there if
25 they weren't produced that would have been relevant? You're

1 saying you made an effort to use what you had to speak to that
2 point, but this would potentially be information you didn't
3 have. So you couldn't use it if you didn't have it.

4 **MR. GRAY:** Right. But the Defendant and his client
5 had indicated we are comfortable going to trial now. We are
6 ready and prepared for trial and --

7 **THE COURT:** Right, that's trial, though. The problem
8 is that that was for trial and if we are now looking to
9 sentencing and a potentially different view of what this
10 information might be, whether this information is valuable for
11 some other reason that wasn't the focus. If you didn't have
12 them you couldn't say. That's what I'm concerned about. I
13 understand and it's -- you didn't look at these emails so then
14 you can't -- you said to me, and these aren't your exact words,
15 essentially at the trial your whole point was to show what work
16 wasn't done.

17 **MR. GRAY:** Sure.

18 **THE COURT:** Meaning what work was done would be
19 encompassed.

20 **MR. GRAY:** They're opposite sides --

21 **THE COURT:** Two sides of sort of a similar -- of the
22 same coin. So if you're showing one, you're necessarily
23 showing the other.

24 **MR. GRAY:** Yes.

25 **THE COURT:** But if you didn't have them, you can't use

1 them. You can't say that they wouldn't have added to what you
2 either were trying to prove that they don't in fact
3 substantiate her claim but how can we say they don't if we
4 don't know what they say? That's what I'm worried about.

5 **MR. GRAY:** Well, we can say that the Defendant and her
6 attorney, who consulted together about this, felt that they
7 were ready for trial with what they had so clearly they weren't
8 expecting --

9 **THE COURT:** It was an odd, in some ways, it's -- I
10 don't know about odd -- it surprised me.

11 **MR. GRAY:** Clearly you were surprised, the transcript
12 reflects that.

13 **THE COURT:** Oh, okay.

14 **MR. GRAY:** And that's why you bent over backwards to
15 say, well, we don't have to make the decision today,
16 January 4th. Please consult with your client and then we took
17 it up again on the 10th. And then, I think, I'm sure before we
18 actually went to trial, which was only a week later with the
19 jury selection, that it was confirmed that she wants this trial
20 date. She wants to go ahead and do it --

21 **THE COURT:** Well, that did shock me because the fight
22 was so vigorous on the part of the defense for these documents
23 and so I do remember. I can't say I can give you the words I
24 expressed, but overall my sense was that there had been an
25 expectation the Government would be able to meet these --

1 comply with my order earlier --

2 **MR. GRAY:** Within a fairly reasonable period of time.

3 **THE COURT:** Yeah, and it took longer and that was
4 known. And we -- I thought that it was a yeoman's effort on
5 the part of the Government. I thought my Order was rather
6 daunting but I issued it. And it was much narrower than the
7 defense had sought, I suppose, but it was still substantial.
8 I -- Mr. Cooch wrote very detailed letters along the way
9 documenting what I have said already was what I regarded as a
10 Herculean effort by NSA to meet the Court's demands and its
11 Order. And I had no criticism of the Government in that
12 respect except that we were facing a deadline. And then what
13 happened was we were at the crossroads because it couldn't --
14 the Government couldn't get this all completed. It was
15 voluminous, much of which I'm not sure I ever really fully
16 understood what Mr. Ahlers thought it was going to show, but he
17 wanted it.

18 **MR. GRAY:** As Your Honor remembers, and has noted a
19 number of times, we saw virtually no --

20 **THE COURT:** Use of it.

21 **MR. GRAY:** No, you said this, we saw virtually no
22 documents that were produced in response to your Order that
23 turned up as defense exhibits at trial.

24 **THE COURT:** Right. That's what I meant by no use of
25 it.

1 **MR. GRAY:** I'm sorry, I thought you said it.

2 **THE COURT:** No, no, that they weren't used ultimately.
3 Whatever was produced.

4 **MR. GRAY:** The couple that were were the annual review
5 for 2016 which I think was in final form, it was never actually
6 signed off on. And there was one other draft review that was
7 found. Those are really the only things found as part of that
8 effort that the defense got some mileage out of. Mr. Ahlers
9 purported to consider them very significant. I recall at one
10 of the hearings you said, I don't think they're really as
11 significant as all that because all it basically says is we're
12 getting the invoices on regular basis, the contract work is
13 proceeding smoothly, we think everything is okay. She must be
14 doing a fine job. They didn't have the full information that
15 we had about what she was actually billing for and rarely she
16 was in fact here and how little evidence there was of any work
17 by her.

18 **THE COURT:** But as we're now about to wrap up, I would
19 like to come to a conclusion, and I'm glad Mr. Pine is here, I
20 still am of the view that what was potentially basically -- I
21 don't want to use the word forfeited -- it's just the only one
22 that's coming to mind. What the defense was willing to
23 basically forfeit in order to be able to go to trial on the
24 date they wanted doesn't bind them here. It doesn't mean that
25 just because they were willing to proceed without some of this

1 information at the trial that that barred them from ever
2 getting it at a later time if it was relevant for sentencing
3 and that's the conundrum. Because some of this, I want to say,
4 I've said it so many times it's boring, but please for give me,
5 but it's -- counsel, the people in the room have lived this,
6 Ms. McComber first and foremost, and then the Government and
7 the Court. The lawyers who are now representing Ms. McComber,
8 passionately doing so, have only been short-timers in a very
9 long case. And I'll use the word at times excruciating. I
10 mean, I've said that publicly so it's not news to anyone.

11 I thought the Government made a Herculean effort to comply
12 with my Order. I don't know if my Order was right. I did what
13 I did because that's what I thought was right or I wouldn't
14 have done it. Probably a different judge, maybe somebody would
15 have given the defense more and maybe somebody would have cut
16 it in half or not at all. But this was, Mr. Ahlers beat that
17 drum repeatedly, and that is not a criticism, I'm just says, he
18 was incredibly persistent that's the result of that persistence
19 was reflected in my ruling at ECF-198 and other rulings. I
20 mean, he started with a bill of particulars, and he never
21 forgave me, if you will, for ruling against him on that.

22 But this came after much discussion, consideration,
23 reflection and so that's what I ordered. I felt everybody did
24 try really their best, as far as I could tell to meet it.
25 Mr. Cooch gave really detailed from the front lines reports on

1 where we were but it wasn't everything. It never was
2 everything. And that's the defense's decision. Now, that
3 doesn't mean, I've said this already, it doesn't bar them from
4 getting what they're entitled to for the sentencing. So where
5 do we go from here?

6 How can we effectuate what now is, I think, a pretty
7 narrow request. I didn't hear a request for those emails, for
8 example, what I'm hearing are -- well, I guess there was. But
9 I don't know how we reconstruct that. What you said from your
10 review is of the overbroad request of the Defendant, which her
11 lawyer basically abandoned, there were potentially arguably
12 142, maybe that's not the number --

13 **MR. GRAY:** 172.

14 **THE COURT:** Okay. And then the 299. So a small
15 fraction or maybe 40 percent of what she originally asked for,
16 can those be produced?

17 **MR. GRAY:** Sure.

18 **THE COURT:** Then let's do it.

19 **MR. GRAY:** I mean, they may have already been produced
20 as part of the production.

21 **THE COURT:** Well, I don't know how to tell that.

22 **MR. GRAY:** Because that would have been based on the
23 key document searches which is what Ms. Darrow wanted to be
24 able to do.

25 **THE COURT:** It's possible there are duplications.

1 **MR. GRAY:** It's already been done.

2 **THE COURT:** Right. But the answer is we don't know.
3 I don't know what she asked for. I don't plan to know what she
4 asked for. But somebody I hope does know what she asked for.
5 I don't know. It's quite possible, I hear you loud and clear,
6 this may be why Mr. Ahlers abandoned it. Maybe it came up in a
7 different vehicle, but I don't know how to answer that.

8 **MR. GRAY:** I'm not following you.

9 **THE COURT:** Yes, you just said. Those documents may
10 have already been produced because of the key search.

11 **MR. GRAY:** Right, yes.

12 **THE COURT:** But I don't know that. So I don't know
13 how to tell that either.

14 **MR. GRAY:** Right.

15 **THE COURT:** So all I'm asking is can, either you would
16 then be reproducing or telling them you already have it, I
17 don't know which, but that you focus, and I'm going to accept
18 your representation that this was a ridiculously overbroad
19 request but as to that request you've narrowed it down to what
20 might well be relevant, the ones she wrote or the ones that
21 went to her and a narrow group of people. Let's get that done.

22 **MR. GRAY:** All right, Your Honor.

23 **THE COURT:** And then they want -- you've represented,
24 and I'm going to accept your representation that there are no
25 other stoplight documents.

1 **MR. GRAY:** Right.

2 **THE COURT:** We know for the period that you just
3 started your argument by showing us, again, an exhibit from
4 trial where she, herself, said for six months they hadn't had
5 to produce status reports, but that doesn't cover the whole
6 indictment period or performance evaluations. Maybe they're
7 not the same thing.

8 Ms. Richman gave a pretty focused list. Is it possible
9 that that list can be reviewed? We're not working off my
10 Order. I don't think that's the framework anymore. My Order
11 again being ECF-198. But, rather, Ms. Richman spoke about
12 performance evaluations, the project management reports,
13 monthly status reports. We know at least the period -- there's
14 a period where there weren't any, but we don't know if there
15 are others, technical status reports. And then anything that
16 would support Ms. McComber's claim that she spent time hiring,
17 recruiting, and staffing.

18 I think those are your requests; is that right? And the
19 emails.

20 **MS. RICHMAN:** Your Honor, with respect to the status
21 reports, I want to share my understanding that there are
22 different kinds of status reports at NSA. The report that that
23 correspondence was about was a technical report. There's also
24 reference in the testimony that there were COR monthly status
25 reports, which were different type of reports, which there was

1 some testimony at trial about the existence of those.

2 So I want to make clear that we are, you know, looking for
3 status reports in whatever form they come. The ones that Jason
4 Doyle testified about, I think, are different from the ones
5 that he was --

6 **THE COURT:** The problem is, don't you have some of
7 this?

8 **MS. RICHMAN:** No. We are missing any single monthly
9 status report in the formulation that Jason Clark appeared to
10 testify that they exist. We just have the technical status
11 report. So I think that's a keyword. It seems like the word
12 "status" and "report" are going to be within close proximity of
13 each other. So I'm not sure how --

14 **THE COURT:** Okay. So just to be clear, Mr. Gray has
15 an upcoming annual leave scheduled which was a trip postponed
16 to go to trial or -- well, we had the trial date so I don't
17 know exactly if I've said that correct.

18 **MR. GRAY:** I had to cancel it in order to be present
19 at the trial.

20 **THE COURT:** So in other words you canceled the trip so
21 we could have --

22 **MR. GRAY:** Yes.

23 **THE COURT:** -- not obviously -- this happened in
24 advance of our trial date.

25 **MR. GRAY:** Yes.

1 **THE COURT:** You were willing to go to trial
2 January 23rd when I was rescheduling, am I saying this right,
3 but that involved you canceling a trip?

4 **MR. GRAY:** Yes.

5 **THE COURT:** And now you've rescheduled it for when?

6 **MR. GRAY:** February the 16th through the 29th.

7 **THE COURT:** So the one thing I said I never want to do
8 is postpone the sentencing. But I also feel -- I don't want
9 this to come out in the wrong way. This is onerous. I think
10 I've asked the Government -- I'm asking the Government to redo,
11 possibly, what it's done already. I don't have a sense of how
12 long this will take so I'm not committing to changing the
13 sentencing date. But if I hear that this is necessary in order
14 to accommodate the defense request, then that's what I'll
15 contemplate. Besides Ms. McComber and me, probably, no one in
16 this courtroom, maybe Mr. Gray, I don't know, wants this to
17 be -- come to a conclusion. But I also can't ask more than is
18 humanly possible.

19 I think the Government -- Mr. Gray has had to do the same
20 things more than once and that's not a criticism. That's just
21 reality. This became the result of a change in counsel.
22 Obviously this was a massive undertaking for the defense to get
23 up to speed. It really imposed on the Government to help, if
24 you will. I'm trying to be sensitive to everybody by saying
25 this. I'm not saying I will postpone the sentencing, but if it

1 becomes necessary, I'll keep an open mind because the thing
2 that I want to avoid is making it so onerous that for the
3 Government to accommodate the request that it can't accommodate
4 the request.

5 **MR. GRAY:** I want to be clear about this, Your Honor,
6 that obviously we had an ongoing effort that had been stood up
7 in September, October, November, December, and January of
8 2022/2023 to comply with the defense's request and Mr. Cooch is
9 now gone. For all I know some of the other NSA employees may
10 have left. There may be, whatever you order us to do we will
11 do, but there will obviously be more time consumed because
12 there's --

13 **THE COURT:** Well, it's really unfortunate. I'm not --
14 I make a lot of decisions but the one I didn't make is taking
15 Mr. Cooch off the case. I think that's just outrageous, an
16 outrageously ill-conceived decision to take him off this case
17 and leave you to be the only one handling it, Mr. Gray, when he
18 was the one intimately involved in this aspect especially of
19 the case. It's just unfair.

20 **MR. GRAY:** Your Honor, the fraud section had been
21 extraordinarily forbearing and he had remained spending full
22 time with our office a lot longer than they ever contemplated
23 at the beginning.

24 **THE COURT:** Then they shouldn't have given them to you
25 to help in the first place.

1 **MR. GRAY:** No, it was a great thing for them to do. I
2 mean, he had an amazing -- that was his first trial.

3 **THE COURT:** Okay. I'm happy for all of that, but here
4 we are and you're the one holding the bag. So I'm actually
5 trying to be sensitive to everybody by saying I'll adjust dates
6 if necessary. My first and foremost concern is I'd like to get
7 the defense the documents that were sort of in the works that
8 might be responsive to these particular requests that never got
9 produced because Mr. Ahlers and Ms. McComber chose to pull the
10 plug.

11 **MR. GRAY:** Your Honor, I'll consult with people at the
12 NSA about finding out where exactly things stood. Obviously
13 the email issue also needs to be addressed and resolved as to
14 what's going to happen there.

15 **THE COURT:** Will someone prepare an order for me?

16 **MS. RICHMAN:** Your Honor, yes. I have several things
17 I want to make a record of and also a suggestion with respect
18 to the order.

19 **THE COURT:** Okay.

20 **MS. RICHMAN:** First, I want to make clear because
21 there's been different standards referred to throughout this
22 discussion that there's no obligation to request or identify
23 with specificity *Brady* materials for the Government. It is
24 their constitutional obligation to fulfill, and I just want to
25 make sure that *Bagley v. United States* is on the record here

1 because Mr. Gray has suggested that there's an onus on
2 Ms. McComber to identify these materials.

3 **MR. GRAY:** I simply said it would be helpful.

4 **MS. RICHMAN:** Secondly, Your Honor, I want to also
5 make a record of the fact that our request for these documents
6 has been pending since August 2nd. It has been met with a wall
7 of no. There has not been willingness to really discuss them
8 at all and Ms. McComber is, like you, anxious to get to
9 resolution of this case.

10 **THE COURT:** Can I interrupt, just a couple of things.
11 I think the record shows that you may not have gotten a
12 satisfactory response but you cannot -- Mr. Gray, it looks to
13 me, like he has been very helpful and has attempted to be
14 helpful and has undertaken a lot on his own. So I just don't
15 think that's a fair characterization of the record.

16 **MS. RICHMAN:** Your Honor, I think what the record will
17 show is that aside from -- I think he said he conducted
18 searches for the stoplight chart following my August request,
19 but that aside from that search the Government has taken no
20 steps to search the materials that we've been discussing in
21 this hearing for responsiveness to the defense's request, the
22 documents that were at discussion in those status reports until
23 this month. So, Your Honor, I want to make a record that that
24 request, specifically with extant items that have not been
25 produced, has been pending since August.

1 So I'm conscious of Mr. Gray being solo on this case. I'm
2 also conscious that the Department of Justice is the largest
3 law firm in the country. I know there's already a request from
4 Mr. Gray pending to change his deadline for tomorrow's
5 sentencing submission and other dates. To the extent that
6 there are shifts I would like to, if we can, set a date certain
7 by which we will just call it done.

8 **THE COURT:** So, just to be clear, though, my
9 understanding is that Mr. Gray actually met with you to go over
10 the various aspects of the case. I mean, personally -- he
11 didn't -- I don't know that he had to.

12 **MS. RICHMAN:** He's done a lot, Your Honor, but with
13 respect to this request I think the record has been established
14 today what he has and has not done and that is what this
15 request is cabin to. This is about materials that we've been
16 asking the Government to look for within their custody and
17 control that are related to material to loss within the
18 constitutional obligations that the Government has. Yes, the
19 government has been very helpful in showing us the exhibits
20 that, in its view, supports its theory of loss that supported
21 her conviction at trial. But with respect to this issue, Your
22 Honor, they have argued here today that they have taken no
23 steps beyond searching for the stoplight charts since that
24 August request was made.

25 **MR. GRAY:** May I respond to that because we need to

1 clarify the record.

2 **THE COURT:** Yes.

3 **MR. GRAY:** She was dead wrong on some of that stuff.
4 With regard to the stoplight charts, that was not specifically
5 asked for by anything the defense produced to us back in
6 August. Certainly not that I recall.

7 **MS. RICHMAN:** No, we didn't say it was. We're just
8 saying that's the only thing you said you searched for.

9 **MR. GRAY:** May I be heard?

10 **THE COURT:** Now, come on.

11 **MR. GRAY:** The first time I got anything from the
12 defense about the stoplight reports was in, I think, Ms. Weeks'
13 email to me on -- it may have been December the 6th. That was
14 a specific thing that I had no recollection of anyone ever
15 having asked for before and, believe me, that's what I've
16 really been harping on here, I'm delighted to get specific
17 requests that will help reduce the burden on the NSA in terms
18 of finding it and getting it out to the defense quicker. So as
19 soon as I got there, I gave her a call and said, could you
20 please clarify a little bit about what the stoplight things are
21 that you're looking for and why you think they exist. And she
22 said, yes, see, we have this one of them, and she sent it to
23 me. I immediately then went to the NSA and said, hey folks, do
24 we have any more of these? The answer came back, no, that's
25 one of the things we turned over, that's all we found. So I

1 just want to make sure the record is clear on that.

2 **MS. RICHMAN:** I'll just note that I specifically
3 referenced the stoplight charts during the November 20, 2022
4 [sic] evidentiary hearing, but I don't think it's productive to
5 go into a tit for tat. The overall picture here, Your Honor,
6 that we're seeking assistance from the Court on is whether the
7 Government has an obligation to produce documents for materials
8 collected but not produced in advance of trial with respect to
9 sentencing. It sounds like the Court is inclined to grant that
10 request. We are grateful for that.

11 **THE COURT:** I am, but I don't want it to be overbroad.

12 **MS. RICHMAN:** Yes, Your Honor.

13 **THE COURT:** And I don't -- much of what I thought
14 Mr. Ahlers was pressing, it somewhat reminds me of this, was a
15 fishing expedition.

16 **MS. RICHMAN:** Correct.

17 **THE COURT:** And to the point that he had these very
18 broad categories, and I'm not sure what end he was thinking
19 that -- what they were going to establish. I couldn't read his
20 mind. He said what he said. I granted the request that I
21 granted. But it's a little late for a fishing exception and we
22 don't have time for that at this point. So and I do agree that
23 if there was something specific that the Defendant was aware of
24 that would establish the point she's trying to make, she would
25 know what -- even if she didn't have them, she would know.

1 Like, I filed -- I had performance evaluations, or I had
2 monthly status reports from roughly this period or that period,
3 that would help focus the search. Because, apparently, I mean,
4 the breadth of what's in ECF-198 is pretty substantial. And
5 it's not like with 30,000 roughly pages produced by the
6 Government, it's not a case where they weren't producing
7 information. Some of it may not have been what you had in
8 mind. But I tried to be as specific as I could in the ECF-198
9 Order. So what I want to leave with today is something really
10 specific so that the Government can do the homework that's
11 required.

12 **MS. RICHMAN:** Yes, Your Honor. And to that end I was
13 going to offer for a post hearing submission from the defense
14 identifying with specificity particular items or materials that
15 we would like the Government to search for. We can do so with
16 citation to why we think that they're in the Government's
17 custody and control where we are able, to get that before the
18 court so that we can set --

19 **THE COURT:** When will this come in?

20 **MS. RICHMAN:** I will have to confer with my team, Your
21 Honor. We can try to get that turned around fairly quickly.

22 **THE COURT:** Just so you know, I'm not here next week.

23 **MS. RICHMAN:** Me neither, Your Honor.

24 **THE COURT:** We're closed tomorrow, we're closed Monday
25 obviously is Christmas, and Tuesday I think the Court is also

1 closed. So that's the problem. And, Mr. Gray, didn't you say
2 you were going away?

3 **MR. GRAY:** I'm off next week as well.

4 **THE COURT:** You're off next week but otherwise --

5 **MR. GRAY:** My trip isn't until mid February.

6 **MS. RICHMAN:** Your Honor, I'm not sure that there's
7 any chance of any document collection meaningfully beginning
8 before January in any case.

9 **THE COURT:** True, but that's why I'm nervous about the
10 sentencing.

11 **MS. RICHMAN:** Again, Your Honor, Mr. Gray has already
12 asked to move his submission date for his sentencing
13 memorandums, which is due tomorrow. So I do think we need to
14 make some scheduling decisions today. In any case, I'm not
15 sure whether they will result in moving the sentencing date.
16 I'll note that our submission is due on January 10th.

17 **THE COURT:** So let's talk about what you're asking
18 for, Mr. Gray. Did I get something on this?

19 **MR. GRAY:** Yes, I sent you a letter. Well, let's see.

20 **THE COURT:** When did you send that?

21 **MR. GRAY:** I think it was yesterday but earlier in the
22 day, that we had sort of two other things that had been teed up
23 in this mid December time frame.

24 **THE COURT:** Do you by any chance know what the Docket
25 No. is of that letter.

1 **MR. GRAY:** My letter?

2 **THE COURT:** You said you sent one yesterday.

3 **MR. GRAY:** Maybe 384 or something like that. I think
4 we're up in the 380s are the more recent ones now.

5 **THE COURT:** 384?

6 **MS. RICHMAN:** Your Honor, it's ECF-393.

7 **THE COURT:** Okay. Let me see if I've got it. Right
8 here. Okay. I have this letter. Go ahead.

9 **MR. GRAY:** Yes, the conferring on the statement of
10 facts in the Presentence Report was supposed to be concluded by
11 last Friday. As I indicated in this letter, that's just --
12 that's fallen victim to the exigencies in my schedule over the
13 last couple of months and the loss of Mr. Cooch that have just
14 made that not possible. So we need to figure out when we can
15 reasonably do that and it sounds like most of us are not even
16 going to be working next week.

17 **THE COURT:** We're working but not physically here.

18 **MS. RICHMAN:** We'll be offsite, Your Honor.

19 **THE COURT:** Always let the record reflect.

20 (Laughter.)

21 **MR. GRAY:** Your Honor, I'm serious. I need some time
22 when I don't have to work period for a while. Then there's the
23 Government sentencing memo, really, the updated sentencing
24 memo, the sentencing memo addressing issues that have arisen
25 since trial or weren't pertinent at trial.

1 **THE COURT:** So is that what's due on December 22nd?

2 **MR. GRAY:** Yes, that's right.

3 **THE COURT:** So I think when we set that date we hadn't
4 yet made a decision to close the courthouse because I wouldn't
5 have set it for a date --

6 **MR. GRAY:** I think that decision usually gets made --

7 **THE COURT:** Yeah, the judges decided at a bench
8 meeting a few weeks ago and whenever it was announced that's
9 when it happened. So I think when the date of December 22nd
10 was chosen, I hadn't anticipated we wouldn't be open tomorrow.

11 **MR. GRAY:** I mean, I haven't had any time to work on
12 that sentencing memo over the last three weeks between trying
13 to deal with, like, the discovery issues relating to the
14 emails, the responding to the December 9th letter, and being
15 duty assistant consumes a lot of time.

16 **THE COURT:** The other issue is that it's somewhat
17 premature if we don't have all of the discovery.

18 **MR. GRAY:** Right. Also the idea of putting the
19 sentencing memo then was that we would have finished the week
20 before with defining what was still in dispute as to the
21 statement of facts so we're not there yet. So really, until we
22 know what our deadline is going to be for the statement of
23 facts issues, we can't get the sentencing memo deadlines
24 rolling after that.

25 **THE COURT:** So I know this is all going to impact our

1 sentencing date, it just has to. But tell me, what are you
2 asking for?

3 **MR. GRAY:** Your Honor, I think what I would like to do
4 is to get back to my office, take a look at my calendar. As I
5 say, take a look at the fact that I really do need some time
6 when I don't have to work for at least a week. And then figure
7 out what we can manage.

8 I think probably we should be shooting for some date maybe
9 at the end of that first week of January for us to do our
10 discussion of the disputed and undisputed sentencing facts. I
11 mean, we would need to meet and discuss that over the course of
12 that week. Maybe try to have that ready by the beginning of
13 the following week and then we can map out the sentencing memo
14 schedule from there.

15 **THE COURT:** Well, I certainly couldn't follow most of
16 all of that. So it sounds too vague for me.

17 **MR. GRAY:** We'll need to do -- the prosecution and the
18 defense will each need to look at the disputed findings of fact
19 once again and then communicate with each other about those and
20 then probably have a meeting at which we -- maybe not have a
21 meeting. Just say these are the ones we've got agreement on,
22 these are the ones we don't.

23 **THE COURT:** I thought you were close to a resolution
24 of that?

25 **MR. GRAY:** Well, remember, the resolution may include

1 there's an awful lot of things here we can't reach agreement
2 on. I mean, if you want to set -- it's only going to be a
3 four-day week that first week that we're back after New Year's
4 day anyway. If you want to set a deadline for the end of that
5 week, perhaps better the following Monday for the 8th, which
6 would be the --

7 **THE COURT:** Would that be for your sentencing memo?

8 **MR. GRAY:** No, that would be for resolution of the
9 disputed findings of fact in the PSR. And I do note that
10 that's the date, I believe, when the defense's Rule 29 reply
11 brief would be due, is January the 8th, Monday.

12 **THE COURT:** That's still okay with you, Ms. Richman?

13 **MS. RICHMAN:** Your Honor, we had asked for three
14 additional days to January 11th for our MJOA reply.

15 **THE COURT:** I'm sure that Mr. Gray --

16 **MR. GRAY:** No objection.

17 **THE COURT:** -- would not object.

18 **MR. GRAY:** Thank you, Your Honor.

19 **THE COURT:** Somebody is going to have to prepare an
20 order. I have no assistant this week, as I told you yesterday.
21 So 1/11/24 will be the Defendant's response to the
22 Government's -- was this your reply?

23 **MS. RICHMAN:** Yes, Your Honor, reply to the --

24 **THE COURT:** Defendant's reply for the MJOA motion.
25 Okay. But before that would be 1/8 for resolution of disputed

1 facts. That's between the parties. That's not a filing or is
2 it a filing?

3 **MR. GRAY:** Well, we'd have to send some kind of a
4 letter to the probation officer and to you setting out the
5 final conclusions.

6 **THE COURT:** So it is something in writing. So that'll
7 be the first thing. Then 1/11. Then what's next?

8 **MR. GRAY:** Then after that I think it's the defense's
9 response to our sentencing memo, then our reply brief on the
10 sentencing memo --

11 **THE COURT:** When is your sentencing memo?

12 **MR. GRAY:** I think you said, well, let's see. We have
13 to have the agreement --

14 **THE COURT:** We didn't set a date, it's due tomorrow.

15 **MR. GRAY:** Right.

16 **THE COURT:** And that's what you're trying to change,
17 so what are you proposing is what I'm asking?

18 **MR. GRAY:** So it has to follow the resolution of the
19 factual findings in the PSR, so if that goes in on the 8th, two
20 weeks after that would be 22nd.

21 **THE COURT:** Okay. And then --

22 **MR. GRAY:** I guess defense -- that's my -- they get to
23 respond to the sentencing memorandum and then I get to file
24 some kind of a reply brief.

25 **THE COURT:** Do we still have our MJOA argument?

1 That's the 23rd, right?

2 **MR. GRAY:** That's the 23rd. So if we've gotten -- all
3 of the MJOA stuff would be done by the 11th.

4 **THE COURT:** So we can still have that on the 23rd?

5 **MR. GRAY:** Yes.

6 **THE COURT:** That's helpful. But the Defendant's
7 response to your sentencing memo, what would that be?

8 **MR. GRAY:** I would say two weeks from the 22nd of
9 January.

10 **MS. RICHMAN:** I think, Your Honor, that date is
11 February 5th and I can never recall when President's Day is.

12 **MR. GRAY:** That would be like the third Monday.

13 **MS. RICHMAN:** So this is the first Monday,
14 February 5th.

15 **MR. GRAY:** Actually, since Ms. Richman has a relevant
16 point there, the 22nd may actually be Martin Luther King.

17 **MS. RICHMAN:** I think it's early this year.

18 **MR. GRAY:** So the court would be closed.

19 **MS. RICHMAN:** It's the 15th.

20 **THE COURT:** Let me run and get my calendar. You don't
21 have to take any formal recess. I'm just running in to get it.

22 So the MJOA hearing is set for the 23rd, okay. That
23 doesn't have to change. But the response to the Government's
24 sentencing memo, well, the Government's sentencing memo, let's
25 look at January 22nd and whether that's -- that is not a

1 holiday so is that the date?

2 MR. GRAY: Works with us, Your Honor.

3 THE COURT: Then the defense response, you don't know
4 how long you need for sure, but we're going to go with two
5 weeks, right?

6 MS. RICHMAN: Yes, Your Honor, thank you.

7 MR. GRAY: February 5th.

8 MS. RICHMAN: Yes.

9 THE COURT: So that would be February 5th. And the
10 Government, I don't know that you're planning to reply?

11 MR. GRAY: If we did reply, I'd have to get the reply
12 in by the 15th in any case because I'm leaving the country the
13 next day.

14 THE COURT: By the 15th you said?

15 MR. GRAY: Yeah, it would have to be in by the 15th.
16 That's 10 days.

17 THE COURT: Clearly we've passed the sentencing date.

18 MR. GRAY: Right.

19 THE COURT: So now what?

20 MR. GRAY: It might be feasible to basically move the
21 sentencing date back around a month and do it some time the
22 first part of --

23 THE COURT: About when?

24 MR. GRAY: Maybe sometime in the first part of March.

25 THE COURT: Not so good for me. I'm in trial. I

1 mean, I carved this out so I saved the time but. I can do -- I
2 have a trial that starts -- it's been postponed several times,
3 the week of president's week, so it starts on Tuesday the 20th.
4 It probably will go through the 26th or 27th of February.

5 How long do we actually need for the sentencing?

6 **MR. GRAY:** Your Honor, by that time obviously we've
7 had the three days of sentencing hearings, we'll have briefings
8 on the results of the sentencing hearings. The issues will
9 largely be the amount of the loss and the issues of obstruction
10 of justice by the Defendant. So I don't -- the Government
11 would not think this is something that needs to be a whole day.
12 It might need to be a morning or afternoon.

13 **THE COURT:** The Government what?

14 **MR. GRAY:** I would say the Government thinks this
15 could be done in the morning or afternoon and doesn't require
16 the whole day.

17 **THE COURT:** What's the defense's position.

18 **MS. RICHMAN:** Well, I thought this conference was
19 going to go about an hour and a half this morning, Your Honor,
20 so we tend to fill the time. I wonder, I hope that it's only
21 half a day, but I wonder in an abundance of caution whether we
22 ought to set it for a full one.

23 **THE COURT:** Well, I can't do the 4th or 5th. And the
24 6th of March I have something at 11:00, on the 7th of March I
25 have something at 10:00, on the 8th of March I have something

1 at 11:00 and then we have an investiture. But I could -- and I
2 have no assistant to see if anything can be rescheduled. But
3 the March 7th date I don't think it's going to be a long
4 proceeding if it happens at all.

5 **MS. RICHMAN:** Your Honor, I have what I think is going
6 to be a lengthy sentencing proceeding in front of Judge
7 Messitte at 11:00 a.m. on the 7th.

8 **THE COURT:** On the 7th?

9 **MS. RICHMAN:** Yes.

10 **THE COURT:** The one I have on March 8th was postponed
11 once. But I'm willing to -- I'd have to wait, to be honest,
12 until my assistant can call everybody and see if we can move
13 that date on the 8th of March and give it to you instead. Or,
14 I mean, it's set oddly, it wouldn't be that I wanted this so
15 the lawyers must have chosen 11:00, which kind of ruins the
16 whole morning. But I could give you the afternoon, but the
17 afternoon is short because we have that investiture at 4:00.

18 **MR. GRAY:** Whose investiture is that?

19 **THE COURT:** Judge Abelson.

20 So that's not ideal. The other option you said, what time
21 is your sentencing on the 10th? I mean, on the 7th.

22 **MS. RICHMAN:** It's at 11:00 a.m. in Greenbelt, and I
23 think we're going to have at least three witnesses we're
24 presenting during that sentencing.

25 **THE COURT:** Other possibility is I have something at

1 11:00 on March 6th. That's a pretty big case, I don't know if
2 I can move it but I probably can. The person is not in
3 custody. Oh, are you in that case?

4 **MR. GRAY:** Yes, I am, Your Honor. There you are
5 cavalier moving my other sentencing around. Caught ya,
6 (laughter).

7 **THE COURT:** I don't know, why did we pick 11:00 that
8 day?

9 **MR. GRAY:** Probably in part because Mr. Bonsib is
10 defense counsel and he'll be coming up from D.C., and he maybe
11 asked for it and maybe he had something else first thing in the
12 morning. That was probably it.

13 **THE COURT:** I am not 100 percent sure about the week
14 of March 11th. I don't want to schedule that week. What about
15 March 22nd? Is that too long an extension.

16 **MR. GRAY:** I'd rather not go that long, but if we have
17 to do it then we have to do it. The one, this is a lower grade
18 caveat, because of my new responsibilities on the appellate
19 side that is the week of the Fourth Circuit sitting, and I've
20 been learning that I may be asked to jump into appeals without
21 a lot of advance notice. I think we can go ahead and set it
22 in.

23 **THE COURT:** One other way we could do it is we could
24 set up a telephone conference for after the holidays when
25 everybody might have more clarity on scheduling.

1 **MR. GRAY:** Sure.

2 **THE COURT:** Including, did you all want to have a
3 sentencing the week of March 11th? I'm not sure I'm available
4 that week. That's my concern.

5 **MR. GRAY:** I would like to. That week I am also
6 generally available first week of March.

7 **THE COURT:** You're available the first week of March?

8 **MS. RICHMAN:** My only conflict during those two weeks
9 is on the 7th, Your Honor.

10 **THE COURT:** I could do -- I could do the 6th. I can
11 do -- subject to maybe moving your other case, Mr. Gray, I
12 could do the 7th. I can do -- I mean, I have something on all
13 of these days. So that's why I was thinking when my assistant
14 gets back she could find out what could be moved. You can't do
15 the 7th though.

16 **MS. RICHMAN:** No, I'm sitting here wondering
17 whether -- my client in that case is out of custody but we have
18 at least three people we've confirmed their availability on
19 that date. I could check to see whether they would be amenable
20 to another date with Judge Messitte if the Court would like me
21 to, but I'm also very open on the 8th.

22 **THE COURT:** That would be great.

23 **MS. RICHMAN:** Do you want me to check on that.

24 **THE COURT:** What I have on the 7th at 10:00 is a
25 preset date from a show cause order that may not happen but if

1 it does happen I don't think it'll be very long. But I'm
2 warning everybody that I can't promise. I would say
3 11:00 would be safe.

4 **MR. GRAY:** Which date?

5 **THE COURT:** On the 7th. That would be ideal.

6 **MR. GRAY:** It's very wide open for me, Your Honor.

7 **THE COURT:** Pardon?

8 **MR. GRAY:** Thursday, March 7th is wide open for me.

9 **THE COURT:** So if we can say 11:00 on the 7th.

10 **MS. RICHMAN:** Tentatively, Your Honor. I can't reach
11 out to chambers with a request until I confirm that our experts
12 would be able to move --

13 **THE COURT:** Okay. So it's going to be tentatively,
14 subject to Ms. Richman confirming, but it would be 11:00. So I
15 don't have to jeopardize the 10:00. And I'm back to asking,
16 who's going to go prepare the order? And on the order needs to
17 address the discovery that we've been discussing.

18 **MS. RICHMAN:** Your Honor, we are happy to take a stab
19 at that if you want to combine it to one order. I would think
20 we can prepare it and hold off on filing it until I've
21 confirmed --

22 **THE COURT:** Well, I think we should do two orders.
23 One for scheduling and one for discovery.

24 **MS. RICHMAN:** I tend to agree with that, Your Honor.

25 **THE COURT:** So the scheduling one is easy.

1 **MS. RICHMAN:** With preparing, you know, what we think
2 should be searched for by the Government in the form of an
3 order, we are happy to do that. We can provide that by, you
4 know, try to reach consensus with the Government on that in
5 advance or we can just file what we think and let them respond.

6 **THE COURT:** Well, there's two options. You can each
7 submit one and I'll pick.

8 **MS. RICHMAN:** Great.

9 **THE COURT:** Or it's much better if you try to give me
10 a joint order.

11 **MS. RICHMAN:** I'm happy to work towards that, but I'm
12 also out next week, and I love the idea of taking a week of
13 minimizing work responsibilities. So I'd be happy to, you
14 know, we can put some thought into it and we can confer with
15 Mr. Gray the first week of January.

16 **THE COURT:** Well, now that we've come to terms with
17 the fact that we are not going forward on the original -- not
18 the original, the latest sentencing date that does mean we can
19 finalize it all after the holidays.

20 **MS. RICHMAN:** Okay.

21 **THE COURT:** That was the pressure.

22 **MS. RICHMAN:** Yes.

23 **THE COURT:** Meaning that -- which I'm sorry we're not
24 meeting, but given that that's happened I think we should
25 possibly schedule a conference call, though, so that nothing

1 falls through the contracts.

2 MR. GRAY: Sure.

3 THE COURT: That way you can give me an order and that
4 way if there's a problem I can talk to you about it or whatever
5 it might be.

6 MS. RICHMAN: Okay. And we could commit to, of
7 course, sending the Government proposed -- a proposed list
8 early in the first week of the year for them to review and
9 hopefully we can find consensus where it might exist.

10 MR. GRAY: Okay.

11 THE COURT: So what day would you like to have a
12 conference?

13 MS. RICHMAN: Would Friday of that week give the
14 parties time to confer?

15 THE COURT: It will work, but I have an 11:00 and a
16 2:00.

17 MS. RICHMAN: I have a 10:00.

18 MR. GRAY: Are we talking Friday, January 5th?

19 THE COURT: Right.

20 MR. GRAY: I have something at 2:00.

21 THE COURT: Is yours going to be long?

22 MR. GRAY: Shouldn't be hugely long. It's a VOSR.

23 THE COURT: I can't tell what mine is going to be, but
24 do you want to try lunchtime, 1:00?

25 MR. GRAY: Just for a conference call?

1 **THE COURT:** Just for -- hopefully it won't take too
2 long.

3 **MS. RICHMAN:** I think that's fine, Your Honor. I have
4 a doctor's appointment for my son at 10:00, but it should be a
5 quick one.

6 **MR. GRAY:** I just have to be over in court by 2:00.

7 **THE COURT:** I have to be in court at 2:00.

8 **MR. GRAY:** I'll race ya.

9 **THE COURT:** So 1:00 telephone conference. The
10 Government will initiate the call?

11 **MR. GRAY:** Yes.

12 **MS. RICHMAN:** So our take-backs, Your Honor, are a
13 draft scheduling order for the dates discussed today for the
14 party's briefing which I will plane to file --

15 **THE COURT:** And a new sentencing date.

16 **MS. RICHMAN:** Once I've confirmed, I'm going to hold
17 off on the new dates, and I'll sent it to Mr. Gray to put his
18 eyeballs on to make sure that I've got the dates right. So
19 once I work that out with Judge Messitte, I think we can
20 probably file that proposed order on January 2nd, and that will
21 help narrow the issues for discussion on January 5.

22 **THE COURT:** And then on January 5 we're going to --
23 you all, I think what would be helpful is if you try to come to
24 an agreement on exactly what it is with respect to the
25 discovery that the Government is going to undertake and, if

1 not, if you each send me something in advance of what you are
2 asking or agreeing to or willing to do or object to, that way
3 when we talk on January 5 we'll have some talking points. My
4 concern is I only left an hour, or 50 minutes even, so if --
5 that's because I was thinking you wouldn't disagree.

6 **MS. RICHMAN:** I am hopeful, Your Honor. I am
7 eternally optimistic, Your Honor.

8 **THE COURT:** Right. But we may have to resume the call
9 is the point. If you have lengthy disputes then we're not
10 going to finish in the time that we have available for that
11 call.

12 **MS. RICHMAN:** I can tell you, Your Honor, we're very
13 committed to proposing a solution that should not lead to
14 lengthy disputes.

15 **THE COURT:** Okay. All right. Did we cover
16 everything?

17 **MR. GRAY:** I believe we have, Your Honor, from the
18 Government's perspective.

19 **THE COURT:** From the defense?

20 **MS. RICHMAN:** Yes, Your Honor. Many things, and have
21 a wonderful holiday.

22 **THE COURT:** Okay. Everyone, have a very nice holiday,
23 and we'll stand until recess.

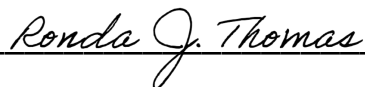
24 **THE CLERK:** All rise. This court stands in recess.

25 (Court adjourned at 1:35 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Ronda J. Thomas, Registered Merit Reporter, Certified Realtime Reporter, in and for the United States District Court for the District of Maryland, do hereby certify, pursuant to 28 U.S.C. § 753, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 3rd day of January 2023.



Ronda J. Thomas, RMR, CRR
Federal Official Reporter

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